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In Conley v. Gibson*, the Supreme Court announced its commitment to a liberal pleading regime in federal civil cases, and for decades thereafter was steadfast in resisting ad hoc heightened pleading rules adopted by lower courts. Thus, from 1957 until a few years ago, most litigants could count on surviving a motion to dismiss a complaint for failure to state a claim so long as their pleading provided some minimal notice to the defendant of the nature of their claim. Enter* Ashcroft v. Iqbal *and* Bell Atlantic Corp. v. Twombly. Iqbal *and* Twombly*, by many accounts, two-stepped the Court from notice to heightened "plausibility" pleading for all civil cases. And this shift garnered both applause and withering criticism. No one seems willing to defend the process that the Court used to abandon fifty years of pleading law—shorn as it was of any attention to the procedures contemplated by the Rules Enabling Act—but as a substantive matter, heightened pleading has many adherents. For its advocates, heightened pleading promises to reduce crowded dockets, make discovery available only to worthy litigants, and generally improve the quality of litigation to which attorneys and federal courts devote their attention. And at the bottom of it all lies a fundamental assumption: notice pleading lets in too many meritless cases, and heightened pleading will keep them*

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out. Despite this assumption, however, there has been almost no empirical analysis of the connection between merit and pleading.

This Article critically intervenes in this discussion by providing empirical data to question the widespread assumptions about the costs and benefits of heightened pleading. The data reported here show that pleadings that survive a notice pleading standard but not a heightened pleading standard—what I refer to as "thin" pleadings—are just as likely to be successful as those cases that would survive heightened pleading. Indeed, the research summarized in this Article, gathered through a novel retrospective analysis of appellate and trial court decisions from 1990 to 1999, suggests that there is no correlation between the heft of a pleading and the ultimate success of a case.

This Article certainly does not end the debate, but it is better to begin on solid empirical footing than on supposition alone. Although there are limitations to the data reported here, they can make an important contribution to the discussion, and they serve to call attention to the costs of heightened pleading even as they suggest avenues for further research. As Congress, the judiciary, and the academy are engaged in a critical discussion as to how to respond to the Supreme Court's most recent alteration of pleading jurisprudence, relevant empirical data should be part of the conversation.

INTRODUCTION

Not for the first time, pleading is at a critical crossroads, being the subject of vigorous debate in the judiciary, the legislature, and the academy. The Supreme Court's decisions in two recent cases, *Bell Atlantic Corp. v. Twombly*[1] and *Ashcroft v. Iqbal*,[2] are the most obvious prompts for the renewed discussion. In *Twombly*, the Supreme Court adopted a "plausibility" pleading standard in reviewing the sufficiency of an antitrust complaint, overruling in part *Conley v. Gibson*,[3] the 1957 case that ratified the "notice" pleading regime adopted by the Federal Rules of Civil Procedure.[4] *Iqbal* extended *Twombly* to all civil actions and applied an even more rigorous standard to a civil rights action filed against high-level federal officials.[5] The end result is a pleading standard that heightens attention to "conclusory" pleading,[6] treats state of mind allegations in a manner at odds with prior precedent,[7] and encourages lower courts to apply their own

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1. 550 U.S. 544 (2007).
2. 129 S. Ct. 1937 (2009).
3. 355 U.S. 41 (1957).
4. *Twombly*, 550 U.S. at 560–63 (reviewing criticisms of *Conley* and concluding that expansive language of the case "has been questioned, criticized, and explained away long enough").
5. *Iqbal*, 129 S. Ct. at 1950 (explaining that in determining whether a complaint is "plausible," judges may rely on their "judicial experience and common sense").
6. *Id.* at 1949–50 (stating that "conclusory" allegations are those that simply mirror the requirements of a cause of action).
7. *Id.* at 1954 (interpreting Federal Rule of Civil Procedure 9(b) to require more than "general" allegations for state of mind even where neither fraud nor mistake is alleged). The *Iqbal* Court's interpretation of Rule 9(b) is arguably at odds with the Advisory Committee

intuitions[8] to decide whether a plaintiff's[9] legal claims and allegations are sufficient to proceed to discovery.[10]

The shift from *Conley* to *Iqbal*/*Twombly* pleading has created controversy and confusion throughout the legal world, both as to whether the recent decisions are meaningfully different from past practice and as to whether anything should be done in response. The debate about just how much of pleading law was changed by *Iqbal* and *Twombly* is perhaps most active within the judiciary.[11] And for those

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Note to Rule 9. *See* FED. R. CIV. P. 9 advisory committee's note (citing ENGLISH RULES UNDER THE JUDICATURE ACT (The Annual Practice, 1937) O. 19, r. 22). The English rules cited by Rule 9 state that when a plaintiff makes allegations as to any "condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred." Jeff Sovern, *Reconsidering Federal Civil Rule 9(b): Do We Need Particularized Pleading Requirements in Fraud Cases?*, 104 F.R.D. 143, 146 n.19 (1985). Moreover, as some courts have recognized, the *Iqbal* Court's treatment of Rule 9(b) is in some tension with its prior decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). *See, e.g.*, Fowler v. Univ. of Pittsburgh Med. Ctr. Shadyside, 578 F.3d 203, 210–11 (3d Cir. 2009); Brown v. Castleton State Coll., 663 F. Supp. 2d 392, 403 n.8 (D. Vt. 2009); *see also* Kasten v. Ford Motor Co., No. 09-11754, 2009 WL 3628012, at *7 (E.D. Mich. Oct. 30, 2009) (stating that tension between *Swierkiewicz* and *Iqbal* has yet to be resolved).

8. *See Iqbal*, 129 S. Ct. at 1950 (advising courts to rely on their "judicial experience and common sense" to determine the plausibility of a claim).

9. Pleading standards obviously apply to all parties. Defendants sometimes bring counter-, cross-, or third-party claims, and as such may face the burden of overcoming heightened pleading standards. Indeed, many courts have applied the *Iqbal* standard to strike affirmative defenses included by defendants in their answers. *See, e.g.*, Francisco v. Verizon S., Inc., No. 3:09CV737, 2010 WL 2990159, at *6 n.3 (E.D. Va. July 29, 2010) (collecting cases). But in this paper I will use "plaintiff" to refer generally to anyone who brings a claim that is subject to a particular pleading standard.

10. *See Iqbal*, 129 S. Ct. at 1950.

11. *Compare, e.g.*, Smith v. Duffey, 576 F.3d 336, 340 (7th Cir. 2009) (panel decision by Posner, J.) (describing *Iqbal* as "special in its own way" and suggesting that it should be limited to cases in which there are concerns about the burdens of discovery), *with Fowler*, 578 F.3d at 210–11 (emphasizing breadth of *Iqbal* and suggesting that it overruled sub silentio *Swierkiewicz*, 534 U.S. at 506). To be fair, the Supreme Court itself stated that it did not consider *Twombly* or *Iqbal* to break significant new ground, *see Iqbal*, 129 S. Ct. at 1949–50; Bell Atl. Corp. v. Twombly, 550 U.S. 544, 563 n.8 (2007), and some lower courts seem to be taking the Court at its word. *See, e.g.*, Valenti v. Massapequa Union Free Sch. Dist., No. 09-CV-977, 2010 WL 475203, at *3 (E.D.N.Y. Feb. 5, 2010); Rouse v. Berry, 680 F. Supp. 2d 233, 236 (D.D.C. 2010); Desrouleaux v. Quest Diagnostics, Inc., No. 09-61672-CIV, 2009 WL 5214964 (S.D. Fla. Dec. 29, 2009); Gillman v. Inner City Broad. Corp., No. 08 Civ. 8909, 2009 WL 3003244, at *3 (S.D.N.Y. Sept. 18, 2009). The dissenters in *Iqbal* took a sharply different view, *see Iqbal*, 129 S. Ct. at 1959–61 (Souter, J., dissenting), and many lower courts have explicitly acknowledged the significant difference between adjudicating pleading motions before and after these decisions. *See* Young v. City of Visalia, 687 F. Supp. 2d 1141, 1144–46, 1149 (E.D. Cal. 2009) (interpreting *Iqbal* to overturn Ninth Circuit pleading precedent for constitutional claims against municipalities); Doe v. Butte Valley Unified Sch. Dist., No. CIV. 09-245, 2009 WL 2424608, at *8 (E.D. Cal. Aug. 6, 2009) (questioning whether, after *Iqbal*, the Federal Rules of Civil Procedure form complaints are still sufficient); Ocasio-Hernandez v. Fortuno-Burset, 639 F. Supp. 2d 217, 226 n.4 (D.P.R. 2009) (acknowledging *Iqbal*'s harsh results); Ibrahim v. Dep't of Homeland

within the judicial branch who interpret the decisions as marking a significant change in pleading standards, there is the question of just what to do about it.[12] Meanwhile, some members of both the House and Senate have determined that *Iqbal* and *Twombly* were momentous and must be overruled legislatively.[13] Finally, there is close to a consensus[14] among academic observers that the *Iqbal*/*Twombly* pleading standard marks a sharp break with the past, a welcome change to some[15]

Sec., No. C 06-00545, 2009 WL 2246194, at *10 (N.D. Cal. July 27, 2009) (criticizing the demanding nature of *Iqbal* standard); Williams v. City of Cleveland, No. 1:09 CV 1310, 2009 WL 2151778, at *4 (N.D. Ohio July 16, 2009) (describing *Iqbal* as imposing a heightened pleading standard); Kyle v. Holinka, No. 09-CV-90, 2009 WL 1867671, at *1 (W.D. Wis. June 29, 2009) (describing *Iqbal* as "implicitly overturn[ing] decades of circuit precedent in which the court of appeals had allowed discrimination claims to be pleaded in a conclusory fashion").

12. The Judicial Conference Advisory Committee on Civil Rules made *Iqbal* a central point of discussion for its May 2010 Civil Litigation Conference at Duke Law School. Press Release, Federal Judiciary, May Conference to Be First of Its Kind to Look at Civil Litigation in Federal Courts (Apr. 12, 2010), *available at* http://www.uscourts.gov/News/NewsView/10-04-12/May_Conference_to_Be_First_of_Its_Kind_to_Look_at_Civil_Litigation_in_Federal_Courts.aspx. And the Civil Rules Advisory Committee, while it considers the ramifications of the Supreme Court's recent shift in pleadings jurisprudence, has been keeping diligent track of the lower court cases citing *Iqbal* and *Twombly*, as well as the dismissal rates pre- and post-*Iqbal* and *Twombly*. *See* Memorandum from Andrea Kuperman to Civil Rules Committee (July 26, 2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal_memo_072610.pdf; Statistics Div., Admin. Office of the U.S. Courts, *Motions to Dismiss*, FED. RULEMAKING, U.S. COURTS, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Motions_to_Dismiss_081210.pdf (last modified Sept. 17, 2010).

13. *See* Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. § 2 (2009); Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. § 2 (2009). These bills seek to ensure that pre-*Twombly* pleading rules govern Rule 8 standards.

14. At least one respected commentator has suggested that *Iqbal* and *Twombly* are not necessarily as consequential as most academics seem to believe. Edward A. Hartnett, *Taming* Twombly*, Even After* Iqbal, 158 U. PA. L. REV. 473 (2010) (arguing for limited reading of *Twombly* and *Iqbal*).

15. Those who support the rule applied in *Iqbal* and *Twombly* offer a variety of justifications. *See* Andrew Blair-Stanek, Twombly *Is the Logical Extension of the* Mathews v. Eldridge *Test to Discovery*, 62 FLA. L. REV. 1 (2010) (arguing that the plausibility standard is a natural extension of procedural due process jurisprudence); Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441 (2010) (arguing that *Iqbal* and *Twombly* conform to the pleading standards in practice outside the United States); Max Huffman, *The Necessity of Pleading Elements in Private Antitrust Conspiracy Claims*, 10 U. PA. J. BUS. & EMP. L. 627, 641–43 (2008) (defending *Twombly* on notice grounds, the high costs of discovery, and concern over permitting "false positives" to proceed past the pleading stage); Keith N. Hylton, *When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards*, 16 SUP. CT. ECON. REV. 39, 50–53 (2008) (constructing an economic model to suggest that pleading standards are useful mediators of merit and defending *Twombly* under this framework); Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability After* Iqbal, 14 LEWIS & CLARK L. REV. 279, 303–05 (2010) (suggesting that *Iqbal* is a useful bar to certain constitutional claims); Douglas G. Smith, *The Evolution of a New Pleading Standard:* Ashcroft v. Iqbal, 88 OR. L. REV. (forthcoming 2010), *available at*

and lamentable to others.[16] Particular attention has been paid to the impact of the *Iqbal* and *Twombly* rules on civil rights litigation, where informational asymmetry is often at its highest point but where federal courts and federal law have played an important historical role in developing and adjudicating substantive rights.[17]

There are many purposes of litigation: compensating victims of wrongful conduct, deterring misconduct, enforcing important social norms, and eliminating the need for recourse to violent self-help, to name a few. In the United States, we generally rely on private parties to fulfill these goals with the assistance of a judicial infrastructure.[18] Pleading rules play a special filtering, or "gatekeeping,"

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http://ssrn.com/abstract=1463844 (maintaining that *Iqbal* will help to screen meritless cases that would otherwise settle because of discovery costs); *see also* Richard A. Epstein, Bell Atlantic v. Twombly*: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 98–99 (2007) (defending *Twombly* to the extent that it is limited to a small subset of cases where there is heightened concern for weak or frivolous cases). *But see* Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules*,*"* 2009 WIS. L. REV. 535, 558 (suggesting that a court concerned with the particular defense of qualified immunity has the power to impose fact pleading as a matter of substantive federal law, but arguing against it).

16. Critics of *Iqbal* and *Twombly*, like supporters, approach the cases from many different perspectives. *See* Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849 (2010) (maintaining that *Iqbal* has extended the plausibility analysis of *Twombly* in a dangerous direction); Edward D. Cavanagh, Twombly*, The Federal Rules of Civil Procedure and the Courts*, 82 ST. JOHN'S L. REV. 877, 879 (2008) (criticizing the change in pleading as a matter of process and questioning the Court's assumption that lower courts and parties cannot manage discovery costs); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010) (suggesting that both cases be reconsidered because of their destabilizing effect and their inconsistency with the process of amending the Federal Rules); Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1932–34 (2009) (stating that in *Twombly*, the Court acted "with no empirical support that a problem existed, and with no exploration of the dimensions of that problem or the efficacy of the Court's newfangled cure"); Kenneth S. Klein, Ashcroft v. Iqbal *Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261, 262 (2009) (suggesting that *Iqbal*'s pleading rule violates the Seventh Amendment right to a jury trial); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517 (2010) (detailing the burden that the new pleading standard will impose on civil rights and employment discrimination plaintiffs); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 460–86 (2008) (criticizing *Twombly* on numerous grounds, including for imposing a standard that would screen out meritorious as well as meritless claims); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 LEWIS & CLARK L. REV. 15 (2010) (arguing that the cases move the summary judgment inquiry to the pleading stage).

17. *See* Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of* Iqbal *on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 85–101 (2010) (detailing the potential impact of *Iqbal* on civil rights cases); Howard M. Wasserman, Iqbal*, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 166–69 (2010) (describing tension between liberal pleading rules and the burdens imposed by substantive civil rights law).

18. In 2007, state courts received about eighteen million civil filings, an increase of about 800,000 cases from 2006. NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF

role in this context.[19] From this gatekeeping perspective, one can imagine many justifications for heightening pleading standards—the high costs of discovery[20] and the desire to reduce heavy caseloads,[21] among others—but a fundamental assumption made by those who support stricter pleading standards is that merit correlates with the factual detail offered by a claimant.[22] On this account, the ease

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STATE COURTS: AN ANALYSIS OF 2007 STATE COURT CASELOADS 1 (2009). Financial disputes over money (primarily contract and small claims cases) comprised about 70% of the civil caseload in state courts. *Id.* In seven representative states, about 6% of civil filings were tort actions and 16% were probate filings. *Id.* at 2. It is fair to conclude that the vast majority of the work of state courts involves resolution of disputes between private parties on both sides of the litigation. Cases filed in federal court are much more likely to involve government parties either as plaintiffs or defendants, although federal filings are miniscule compared to state court filings. For instance, out of 276,937 civil cases filed in United States District Courts between October 2008 and September 2009, perhaps half may have involved government parties: 8,834 cases in which the United States was a plaintiff; 34,310 cases in which the United States was a defendant; 273 cases that involved a challenge to the constitutionality of a state statute; 41,000 cases that involved petitions by state prisoners; and about 34,000 cases classified as civil rights, some portion of which might involve state defendants. ADMIN. OFFICE OF THE U.S. COURTS, 2009 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 141–43 tbl.C-2 (2010), *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinespdfversion.pdf.

19. Commentators now commonly characterize pleading, like summary judgment or *Daubert* determinations, as having a "gatekeeping" function. *See* Clermont, *supra* note 16, at 1932; Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. Rev. 1217, 1224 (2008); Schneider, *supra* note 16, at 527; Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and* Conley v. Gibson, 52 HOW. L.J. 73, 94 (2008).

20. *See* Epstein, *supra* note 15, at 68–72; Douglas G. Smith, *The* Twombly *Revolution?*, 36 PEPP. L. REV. 1063, 1094–95 (2009) (framing heightened pleading as a necessary balance to the high costs of discovery). *But see* John P. Sullivan, Twombly *and* Iqbal*: The Latest Retreat from Notice Pleading*, 43 SUFFOLK U. L. REV. 1, 61 (2009) (criticizing the discovery abuse justification).

21. *See* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1060 (2003).

22. The *Twombly* Court made clear that, precisely because of the high costs of discovery in antitrust actions, it made sense to weed out "anemic" cases through pleading rules rather than other case management devices. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559–60 (2007). And in *Iqbal*, the Court was unwilling to "unlock the doors of discovery" to plaintiffs who had "nothing more than conclusions" to verify the merit of their claim. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009). By contrast, the notice pleading standard articulated in *Conley* was famously agnostic on the ultimate merit of any particular claim. *See* Conley v. Gibson, 355 U.S. 41, 45–47 (1957) (asking whether a claim would lie if allegations were proven and rejecting the argument that a complaint requires factual detail); *see also* Neitzke v. Williams, 490 U.S. 319, 327 (1989) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations."). Indeed, to the extent that Congress has relied on heightened pleading in particular kinds of cases, such as securities fraud cases, it has based that reliance on the assumption that heightened pleading standards can reduce meritless cases without deterring valid ones. *See* Stephen J. Choi, *Do the Merits Matter* Less *After the Private Securities Litigation Reform Act?*, 23 J.L. ECON. & ORG. 598, 600 (2007) (concluding that despite

of notice pleading combined with the high costs of discovery and litigation forces defendants to settle meritless lawsuits rather than defend against them to the hilt in court.[23] Even a few critics of the *Iqbal*/*Twombly* heightened pleading standard tend to assume that there is a rational motivation for raising pleading standards, in order to better filter out meritless suits, even if they disagree with it for other reasons.[24]

There is, however, no empirical basis supporting the assumption that heightened pleading standards—either the plausibility standard ushered in by *Iqbal* and *Twombly* or the closely related "fact pleading" standard[25] that has always lurked as a competitor to notice pleading—are more efficient filters than *Conley*'s notice pleading standard. Other than in the specific area of securities fraud litigation,[26] there has been no empirical inquiry into the connection between what I will (without any claim to originality[27]) refer to as "thin" pleading and the ultimate

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Congress's intent the PSLRA likely deterred the filing of a substantial number of meritorious cases). Nonetheless, the academic commentary regarding *Iqbal* and *Twombly* has routinely accepted the assumption that heightened pleading will mostly work to filter out meritless cases, not prematurely terminate valid ones. *See* Blair-Stanek, *supra* note 15, at 22–23 (maintaining that plaintiff's interest in cases like *Twombly* is minimal because it is unlikely plaintiff has a valid claim); Dodson, *supra* note 15, at 465 (citing efficiency goals as one justification for fact pleading); Geoffrey P. Miller, *Preliminary Judgments*, 2010 U. ILL. L. REV. 165, 167 (listing heightened pleading as one approach for filtering "weak or frivolous cases"); Smith, *supra* note 20, at 1067; Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 169 (2009) (suggesting that for certain kinds of cases heightened pleading can "reduce the cost disparities that can sometimes induce plaintiffs to file frivolous claims").

23. *See Twombly*, 550 U.S. at 560 (cost of discovery); Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005) (expressing concern over abuse of discovery); Fairman, *supra* note 21, at 1059–60 (describing concern with frivolous cases imposing burdensome discovery as a principal judicial justification for heightened pleading); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 436 (1986) (suggesting that heightened pleading is a response to litigation pressure and that there is a limited but valid place for using pleading to address the merits of particular kinds of litigation). Even those who are critics of *Iqbal*'s extension of *Twombly* are swayed, in part, by the idea that heightened pleading may be good medicine for certain kinds of cases. *See* Robert G. Bone, Twombly*, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873 (2009) (arguing that there are some normative arguments in favor of limiting thin pleading, but adoption of rules that depart from notice pleading should be consistent with the statutory or rulemaking process and should be carefully tailored based on particular categories of cases).

24. *See, e.g.*, Epstein, *supra* note 15, at 98–99 (arguing for a limited role of the *Twombly* pleading standard, where there is heightened concern for weak or frivolous cases); Marcus, *supra* note 23, at 436; A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 18, 22 (2009) (acknowledging that the plausibility standard, "at least as stated," vindicates the efficiency interest in screening out cases based on their likelihood of merit). As Spencer recognizes, however, there are other interests at stake in pleading, and plausibility pleading risks undermining those other interests. Spencer, *supra*, at 24–25.

25. *See* Marcus, *supra* note 23, at 444–51 (describing the revival of "fact pleading").

26. *See* Choi, *supra* note 22.

27. *See* Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763, 795 (1995) (questioning, from the perspective of client representation and narrative, use of "thin" pleadings in civil rights cases).

merit of a particular case.[28] The existence of groundless assumptions which come to frame perceptions of litigation is nothing new,[29] but in the context of a pleading standard it is extremely consequential. This Article seeks to begin to fill this gap by exploring the operating assumptions about the role of pleading in civil litigation. The data reported here suggest that the common wisdom among supporters of heightened pleading along the lines of *Iqbal* and *Twombly* cannot be supported empirically. Rules that subject thin pleadings to greater scrutiny and dismissal do not do a better job than notice pleading of filtering out meritless claims. In the absence of empirical evidence that contradicts the conclusions reached here, the recent move towards adoption of a plausibility pleading standard in all civil litigation bears further scrutiny.

I emphasize the limited nature of these data because the empirical inquiry is quite complex. After all, cases that are dismissed under a heightened pleading regime cannot generally be followed to determine their ultimate merit: they have been dismissed and are therefore, absent amendment, lost to follow-up.[30] Thus, I estimate the cost of heightened pleading standards through a novel empirical approach. By focusing on cases decided during a recent ten-year period (1990–1999) in which the *Conley* notice pleading standard was ostensibly good law,[31] I attempt to estimate the ultimate success of thinly pleaded cases. And by comparing this rate of success to the entire set of litigated cases over the same time period, I conclude that thinly pleaded cases are at least as successful as the generality of cases. Furthermore, for some types of cases, most surprisingly civil rights cases, thinly pleaded cases may achieve an even higher level of success than similar actions supported by more detailed or convincing pleadings.

I also emphasize the somewhat narrow framework of the empirical project. The costs and benefits of litigation go beyond measurements of success. There may be significant costs to prematurely dismissing cases that will ultimately prove unsuccessful: some of these lawsuits provide important information to the public about disputed governmental and corporate conduct; some lack "merit" because of remedial limitations like qualified immunity or a statute of limitations, and not because of a lack of a legally cognizable harm. There also may be benefits to prematurely dismissing cases that will ultimately prove meritorious: some lawsuits will drain a significant amount of collective resources for sparse individual gain, through discovery costs and court time, for instance. But, given the empirical

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28. *See* Clermont, *supra* note 16, at 1930–31 (observing that despite the longstanding controversy over pleading, there are no empirical studies "whatsoever on the virtues of case exposition through pleading"); *see also* Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1754, 1759–61 (1998) (finding a dearth of evidence related to the ultimate resolution of 12(b)(6) dismissals on appeal).

29. *E.g.*, Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 431, 453–56 (2004) (referring to debates about employment discrimination litigation).

30. Spencer, *supra* note 24, at 24 ("[I]t is unknowable whether a dismissed claim was nonetheless meritorious in an absolute sense.").

31. As discussed below, even before *Iqbal* and *Twombly*, lower courts did not always hew to the most expansive reading of *Conley*. *See infra* notes 49–53 and accompanying text.

assumption that undergirds much of the support for heightened pleading standards, some empirical inquiry is appropriate.

This Article proceeds in four Parts. Part I identifies the problem by reviewing the history of notice pleading in the United States, the development of alternative models of pleading, and the Supreme Court's vacillation between traditional notice pleading and heightened pleading.[32] Despite the important stakes and policy considerations in play, these debates have taken place without any consideration of empirical evidence. Part II describes the methodology of the study reported here. The paper uses a retrospective review of cases decided over the course of ten years, 1990 to 1999, to isolate those cases that most likely would be vulnerable to dismissal under the *Iqbal* and *Twombly* pleading standard. After identifying these 100-odd cases, I followed them to determine whether they achieved a successful resolution for the claimant. Part III reports and analyzes the data. In brief, the cases identified achieved significant success—more than half of the cases followed through the study resulted in a settlement or a plaintiff's verdict. The level of success in the thinly pleaded cohort compares favorably to general success rates obtained from data provided by the Administrative Office of the United States Courts ("Administrative Office") and from independent research conducted by other scholars. This research suggests that thin pleading does not correlate with lack of merit. This conclusion is buttressed when one disaggregates the cases by type of litigation (civil rights, contracts, antitrust, etc.). Part IV considers the ramifications of these data and alternative explanations for the outcomes reported here, including various selection biases that could flow from the methodology. The bottom-line conclusion is that, to the extent advocates for heightened pleading believe that stricter pleading will be a better filter for merit than notice pleading, that assumption should be questioned. In the midst of the heated debate about the costs that notice pleading imposes upon defendants, this Article draws attention to the substantial costs imposed by heightened pleading standards on plaintiffs with meritorious claims.

I. THE (RE)EMERGENCE OF HEIGHTENED PLEADING STANDARDS

The changes ushered in by the 1938 adoption of the Federal Rules of Civil Procedure are hard to overstate. The Rules' effect on pleading was particularly striking. Prior to the adoption of the Federal Rules, pleading was claim-specific and required adherence to technicalities that the drafters of the Rules sought to

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32. As Kevin Clermont and Stephen Yeazell have observed, there is a marked difference, at least philosophically if not practically, between the plausibility pleading standard adopted by the Court in *Twombly* and *Iqbal* and the heightened fact pleading regime which was often trotted out as an alternative to *Conley*'s notice pleading regime in the 1990s. *See* Clermont & Yeazell, *supra* note 16, at 832–33. These differences are not material, however, to the data reported here, because both plausibility and detailed fact pleading regimes would operate to make thinly pleaded complaints more likely to be dismissed. *See id.* at 833 ("Because plausibility requires the plaintiff to plead particularized facts and maybe even some evidence, the federal pleading product will usually not look much different from a complaint in a heightened-fact-pleading regime.").

eradicate.[33] Rule 8, with its mandate that all a pleading requires is a "short and plain statement of the claim showing that the pleader is entitled to relief,"[34] was a sharp departure from prior practice.[35] As has been recounted by numerous commentators, the transition from common law rules of pleading, to code pleading, to the notice pleading ushered in by the Federal Rules, represented a gradual but significant policy choice marked by reliance on discovery and trial to determine merit rather than technical rules of pleading.[36]

This change was crystallized by the Supreme Court's decision in *Conley v. Gibson*,[37] in which the Court articulated an interpretation of Rule 8 that focused on the notice given to the defendant of the nature of the plaintiff's lawsuit rather than on the relationship of particular pleaded facts to the legal claims at issue. The Court's language, which would come to dominate pleading inquiries for several decades, treated pleading as a way of "facilitat[ing] a proper decision on the merits"[38] by giving a defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests."[39] Although there are interesting and worthwhile debates about the extent to which *Conley* emerged from a debate about *legal* sufficiency of a complaint versus *factual* sufficiency of a complaint, lower courts and the Supreme Court consistently interpreted *Conley* as establishing a minimum factual threshold for complaints, rather than requiring complaints to conform to specific dictates of positive law.[40]

Conley was a strange poster child for notice pleading—the plaintiffs had provided extensive factual detail, they had specified their legal claims, and neither party had briefed or addressed Rule 8, although the respondents did make reference to the "vague" allegations in the complaint.[41] Indeed, the comments made to drafts of Justice Black's opinion for a unanimous Court were minimal, and only Justices Harlan and Brennan seemed to be at all focused on the portion of the opinion that discussed the applicable pleading standard.[42] Thus, the Supreme Court's broad

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33. *See* Marcus, *supra* note 23, at 438–40.

34. FED. R. CIV. P. 8.

35. The goal of the Federal Rules was to create both simplicity and uniformity in pleading and to prevent premature dismissals. *See* Marcus, *supra* note 23, at 439 ("Rule 8(a)(2) was drafted carefully to avoid use of the charged phrases 'fact,' 'conclusion,' and 'cause of action.'").

36. *E.g.*, Fairman, *supra* note 21, at 990–91; *see also* Sherwin, *supra* note 19, at 76–77 (summarizing history of pleading standards and functions from medieval origins onward). For an overall history of the Federal Rules, see generally Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

37. 355 U.S. 41 (1957).

38. *Id.* at 48.

39. *Id.* at 47.

40. *See* Sherwin, *supra* note 19, at 78–83 (framing the issue as a debate between Legal Realists and legal formalists).

41. Brief for Respondents Pat J. Gibson, et. al. at 26, Conley v. Gibson, 355 U.S. 41 (1957) (No. 7), 1957 WL 87662, at *26; *see* Sherwin, *supra* note 19, at 89–90; *see also* Petitioner's Brief, Conley v. Gibson, 355 U.S. 41 (1957) (No. 7), 1957 WL 87661.

42. *See* Memorandum from Justice John M. Harlan to Justice Hugo Black (Nov. 13, 1957) (on file with the author and available from the Collections of the Manuscript Division,

statement that a complaint should survive dismissal "unless it appears beyond doubt that the plaintiff can prove no set of facts . . . which would entitle him to relief,"[43] resolved a heavily disputed issue relating to the meaning of Rule 8 without significant input from the parties or other interested observers. But once so articulated, the notice pleading standard dominated the resolution of pre-discovery motions, at least rhetorically.[44] Until *Iqbal* and *Twombly*, the Supreme Court had maintained a relatively consistent commitment to *Conley*'s notice pleading rule, twice unanimously rejecting heightened pleading standards in civil rights and employment discrimination cases.[45] Admonishing lower courts to adhere to *Conley*'s liberal pleading standard, the Court specifically recognized that the purported justification for heightened pleading standards was to screen out unmeritorious suits.[46] The Court even acknowledged that there might be "practical merits" to heightened fact pleading,[47] but reminded the lower courts that such changes may be obtained only "'by the process of amending the Federal Rules,'" not by judicial fiat.[48]

Thus, one story to tell about the transition from *Conley* to *Iqbal* and *Twombly* is that of a Court which only recently lost faith in a notice pleading standard, perhaps as a result of judgments about the practicalities of modern litigation. But the Court's embrace of notice pleading was not unwavering, as evidenced by its flirtation with heightened pleading well before *Iqbal* and *Twombly*. In 1983, for instance, the Court dropped a footnote in an antitrust case, *Associated General*

Library of Congress, Washington, D.C.); Memorandum from Justice William J. Brennan to Justice Hugo Black (Nov. 15, 1957) (on file with the author and available from the Collections of the Manuscript Division, Library of Congress, Washington, D.C.). As a result of these suggestions, it appears that the following sentence was deleted from the penultimate paragraph of the decision: "Under the Rules the best cause, not the cleverest pleader, is to prevail." *See* Printed and Circulated Draft Opinion (1st) at 7, Conley v. Gibson, 355 U.S. 41 (1957) (circulated Nov. 13, 1957) (on file with the author and available from the Collections of the Manuscript Division, Library of Congress, Washington, D.C.). The aspect of the draft that highlighted the minimum requirements imposed by Rule 8 was retained, however. *See Conley*, 355 U.S. at 47.

43. *Conley*, 355 U.S. at 45–46.

44. Christopher Fairman has argued that notice pleading has rarely been the rule, at least in practice, pointing to examples from antitrust, RICO, environmental, civil rights, intellectual property, and defamation cases, among others, in which lower courts have constructed a variety of heightened pleading standards. *See* Fairman, *supra* note 21, at 998–1011 (summarizing different categories of heightened pleading).

45. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512–13 (2002) (explaining that discovery and summary judgment, not heightened pleading requirements, are the proper means for disposal of unmeritorious suits); Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (stating that the heightened pleading standard for § 1983 claims against municipalities is "impossible to square . . . with the liberal system of 'notice pleading' set up by the Federal Rules"); *see also* Crawford-El v. Britton, 523 U.S. 574, 595 (1998) ("[O]ur cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process.").

46. *Swierkiewicz*, 534 U.S. at 514–15; *Leatherman*, 507 U.S. at 168.

47. *Swierkiewicz*, 534 U.S. at 515.

48. *Id.* (quoting *Leatherman*, 507 U.S. at 168).

Contractors of California, Inc. v. California State Council of Carpenters,[49] that some lower courts took to invite a heightened pleading standard for certain aspects of antitrust claims.[50] And in *Siegert v. Gilley*,[51] Justice Kennedy suggested that heightened pleading standards may be an appropriate judicial tool for accommodating the qualified immunity defense, available to government officials sued for damages.[52] Given the Court's own seeming ambivalence about *Conley*—at least in particular categories of cases like antitrust and civil rights—one can better understand lower courts' willingness to announce temporary departures from a pure notice pleading standard.[53]

Any such ambivalence seems to have evaporated with the Court's announcement of its decisions in *Iqbal* and *Twombly*. In the former, the Court adopted a "plausibility" standard in an antitrust case, expressing its concern, specifically in the antitrust context, that liberal pleading rules, combined with expansive discovery, would pressure defendants to settle weak or meritless cases.[54] *Twombly* also overruled at least the portion of *Conley* that cautioned district courts not to dismiss a case for insufficient pleading unless the court can conclude that "the plaintiff can prove no set of facts" consistent with the defendant's liability.[55] The Court's decision in *Iqbal* closed a theoretical door, left open in *Twombly*, by making it clear that plausibility pleading applied in all civil cases, not just antitrust claims.[56] *Iqbal* also articulated a two-step process for evaluating the sufficiency of

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49. 459 U.S. 519, 528 n.17 (1983).

50. Fairman, *supra* note 21, at 1013–14; *see id.* at 1013–14 nn.173–78.

51. 500 U.S. 226 (1991).

52. *Id.* at 235–36 (Kennedy, J., concurring); *see also* Fairman, *supra* note 21, at 997 & nn.79–81 (summarizing aspects of the Court's jurisprudence in which commitment to notice pleading wavered).

53. At various times, some circuit courts adopted heightened pleading standards in civil rights cases. *E.g.*, Lee v. City of Los Angeles, 250 F.3d 668, 679 (9th Cir. 2001); Breidenbach v. Bolish, 126 F.3d 1288 (10th Cir. 1997); Veney v. Hogan, 70 F.3d 917 (6th Cir. 1995); Kartseva v. Dep't of State, 37 F.3d 1524 (D.C. Cir. 1994); Babb v. Dorman, 33 F.3d 472 (5th Cir. 1994); Williams v. Ala. State Univ., 865 F. Supp. 789 (M.D. Ala. 1994), *rev'd on other grounds*, 102 F.3d 1179 (11th Cir. 1997). By the time that *Twombly* was announced, however, most circuit courts had recognized that their heightened pleading standards could not survive the Supreme Court's decisions in *Leatherman*, *Crawford-El*, and *Swierkiewicz*. *E.g.*, Johnson v. Johnson, 385 F.3d 503, 529 (5th Cir. 2004) (noting that the Fifth Circuit's heightened pleading standard for qualified immunity cases had been overruled in 1995); Galbraith v. Cnty. of Santa Clara, 307 F.3d 1119, 1121 (9th Cir. 2002) (overruling cases which applied heightened pleading standard to civil rights claims); Goad v. Mitchell, 297 F.3d 497, 502 (6th Cir. 2002) (overruling *Veney* in light of *Crawford-El*); Currier v. Doran, 242 F.3d 905, 916 (10th Cir. 2001) (overruling *Breidenbach* in light of *Crawford-El*); Kimberlin v. Quinlan, 199 F.3d 496, 499 (D.C. Cir. 1999) (noting that *Crawford-El* rejected the D.C. Circuit's heightened pleading standard). *But see* Dalrymple v. Reno, 334 F.3d 991, 996 (11th Cir. 2003) (continuing to apply heightened pleading to civil rights claims). Ironically, the Eleventh Circuit has interpreted *Iqbal* to reject a heightened pleading standard for civil rights claims. Randall v. Scott, 610 F.3d 701, 710 (11th Cir. 2010).

54. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559–60 (2007).

55. Conley v. Gibson, 355 U.S. 41, 45–46 (1957); *Twombly*, 550 U.S. at 561–63.

56. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949–50 (2009).

a complaint.[57] First, courts must review each allegation in a complaint and exclude from consideration those allegations that are stated in a "conclusory" fashion.[58] In and of itself, this was not new; what *was* new was the Court's holding that allegations of state of mind, despite the explicit language of Rule 9(b),[59] must be alleged with some factual detail.[60] The second step, the plausibility analysis, assesses the fit between the nonconclusory facts alleged and the relief claimed.[61] *Iqbal* made it clear that the judge's role in plausibility analysis was one that called for the exercise of "judicial experience and common sense,"[62] a surprising turn from the judicial role contemplated in *Conley*.[63]

In both *Iqbal* and *Twombly* the Court disclaimed any intent to adopt a heightened fact pleading standard,[64] and lower courts are confused as to the precise ramifications of the cases.[65] This confusion does not lessen the need to evaluate the

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57. *Id.*

58. *Id.*

59. Under Rule 9(b), "conditions of a person's mind may be alleged generally." FED. R. CIV. P. 9(b).

60. *Iqbal*, 129 S. Ct. at 1949–50.

61. *Id.* at 1950.

62. *Id.*

63. *See* Conley v. Gibson, 355 U.S. 41, 47–48 (1957).

64. *See Iqbal*, 129 S. Ct. at 1937; Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

65. For example, there is a broad dispute over whether "general" allegations of state of mind are sufficient on their own. *Compare, e.g.*, Brenes-Laroche v. Toledo Davila, 682 F. Supp. 2d 179, 187–88 (D.P.R. 2010) (general allegations of defendants' state of mind found sufficient); Capps v. U.S. Bank Nat'l Ass'n, No. CV 09-752-PK, 2009 WL 5149135, at *1 (D. Or. Dec. 28, 2009) (general allegations assumed to include specific facts necessary to support them); Young v. Speziale, No. 07-03129, 2009 WL 3806296, at *6–9 (D.N.J. Nov. 10, 2009) (general allegations may be sufficient in deliberate indifference context.), *with* First Med. Health Plan, Inc. v. CaremarkPCS Caribbean, Inc., 681 F. Supp. 2d 111, 117–20 (D.P.R. 2010) (general allegation of state of mind insufficient); Fabian v. Dunn, No. SA-08-cv-269-X9, 2009 WL 2567866, at *5 n.2 (W.D. Tex. Aug. 14, 2009) (allegation that defendants acted with deliberate indifference is conclusory). Courts also differ over whether an allegation that a defendant "knew" or was "aware" of a particular fact is conclusory or factual. *Compare, e.g.*, Jones v. Hashagen, No. 4:09-CV-889, 2010 WL 128316, at *4 (M.D. Pa. Jan. 12, 2010) (plaintiff's allegation that the superintendent "failure to take action to curb Inmate Mitchell's pattern of assaults, known or should have been known to [him], [and] constituted deliberate indifference" is conclusory (alterations in original) (internal quotation marks omitted)); Smith v. Dist. of Columbia, 674 F. Supp. 2d 209, 211–13 (D.D.C. 2009) (allegation that District "knew of" specific systemic problems with medical care in prisons was conclusory); Kasten v. Ford Motor Co., No. 09-11754, 2009 WL 3628012, at *6 (E.D. Mich. Oct. 30, 2009) (allegation of defendant's awareness insufficient without some statement of source of awareness); Choate v. Merrill, No. 08-24-B-W, 2009 WL 3487768, at *6 (D. Me. Oct. 20, 2009) (in Eighth Amendment case, allegation of supervisor's knowledge of and indifference to lack of adequate life-saving equipment and training was conclusory); Garvins v. Hofbauer, No. 2:09-cv-48, 2009 WL 1874074, at *4 (W.D. Mich. June 26, 2009) (allegation that defendants were "aware" of plaintiff's medical condition insufficient to state claim for deliberate indifference), *with* Mallinckrodt Inc. v. E-Z-Em Inc., 671 F. Supp. 2d 563, 569 (D. Del. 2009) (in patent case, the plaintiff satisfied the pleading standard for an infringement claim by alleging that defendant "became aware" of patent "shortly after" its

benefits and disadvantages of heightened pleading standards. After all, the transition to heightened pleading has been a long time in the making. Even as the Court was consistently rejecting fact pleading standards in the 1990s and early 2000s, Congress, in 1995, chose to impose higher pleading standards in the securities litigation context.[66] And prior to *Iqbal* and *Twombly* the Civil Rules Advisory Committee spent numerous meetings discussing potential adjustments to notice pleading, usually opting to postpone any action in part because lower courts seemed to be demanding more rigorous pleading despite the Supreme Court's contrary pre-*Twombly* holdings.[67] Other than Stephen Choi's notable work regarding securities litigation,[68] and though heightened pleading standards are back in vogue to a certain extent, there has been no empirical inquiry into their effectiveness in filtering out meritless claims. It is to this question that I now turn.

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issuance and that defendants "actively induced" infringing acts); Decker v. Borough of Hughestown, No. 3:09-cv-1463, 2009 WL 4406142, at *4 (M.D. Pa. Nov. 25, 2009) (allegation that defendants "knew or should have known of plaintiff's right to express himself in such a manner" was sufficient to support failure to train claim in First Amendment Monell case (internal quotation marks omitted)); Lewis v. Jordon, No. 1:09CV21, 2009 WL 3718883, at *5 (M.D.N.C. Nov. 4, 2009) (Fourth Amendment claim sufficient where complaint alleged that "Defendant Robinson . . . arrested Plaintiff without probable cause and that Defendants knew there was no probable cause"); Smith v. Sangamon Cnty. Sheriff's Dep't, No. 07-3150, 2009 WL 2601253, at *4 (C.D. Ill. Aug. 20, 2009) (allegation of sheriff's knowledge that he had housed plaintiff with a violent inmate was not conclusory); Vaden v. Campbell, No. 4:09cv12-RH, 2009 WL 1919474, at *3 (N.D. Fla. July 2, 2009) (allegation of sheriff's knowledge of deputy's propensity for sexual assault was not conclusory); Schoppell v. Schrader, No. 1:08-CV-284, 2009 WL 1886090, at *5–7 (N.D. Ind. June 30, 2009) (allegation that county council was on notice that jail was inadequately funded and understaffed, and that another inmate had died because of inadequate medical care, sufficient to state § 1983 claim based on inadequate funding). Limitations of space and time prevent me from providing all of the examples of the differing interpretations that lower courts have adopted when applying *Iqbal* and *Twombly*.

66. *See* Choi, *supra* note 22, at 603.

67. *See* Civil Rules Advisory Committee Minutes 37–38 (May 22–23, 2006), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV05-2006-min.pdf; Civil Rules Advisory Committee Minutes 30 (Oct. 27–28, 2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2005-min.pdf. Indeed, the Advisory Committee's reference to the possibility of emphasizing "the often forgotten words: 'showing that the pleader is entitled to relief'" eerily foreshadows the Supreme Court's own heightened attention to those words in *Iqbal*. *Compare* Civil Rules Advisory Committee Minutes 31 (Oct. 27–28, 2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2005-min.pdf, *with Iqbal*, 129 S. Ct. at 1950 (finding a difference between alleging an entitlement to relief and "showing" such an entitlement).

68. Choi, *supra* note 22. Choi's study does not purport to determine the outcome of thinly pleaded cases; rather, it uses publicly available information to estimate the degree to which the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.), has deterred the filing of valid securities fraud cases.

II. METHODOLOGY

As described above, the goal of this paper is to hazard a prediction of one of the costs, as measured by dismissals of meritorious cases, of imposing the *Iqbal*/*Twombly* pleading standard in all civil cases. There are many different ways to estimate the effects of such a rule. The ideal means would be to identify all cases dismissed as a result of the *Iqbal*/*Twombly* standard, independently assess the dismissed complaints for the merit of their underlying claims, and compare the distribution of merit in that set of cases with the distribution of merit in claims that survive the application of plausibility pleading standards. The impossibility of achieving this level of omniscience should be evident from the outset.[69] Instead, we are left with many different imperfect approaches, a typical problem in empirical inquiries.

Some observers have focused on the differences in dismissal rates pre-*Twombly*, pre-*Iqbal*, and post-*Iqbal*.[70] The purpose of such study is to estimate whether application of *Iqbal* and *Twombly* is resulting in more dismissals of cases at the pleading stage.[71] This approach, while important and useful, has many significant disadvantages. First, as noted above, because cases are dismissed, one has no way of knowing whether the dismissals were "false negatives" or not.[72] Second, the rate of dismissal is of limited utility if defendants are emboldened by decisions like *Iqbal* to bring motions to dismiss in contexts where they never would have been considered in the past.[73] Thus, although the rate of dismissal may stay the same (or

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69. *See* Spencer, *supra* note 24, at 24.

70. *See* Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010) (estimating that motions to dismiss were four times more likely to be granted after *Iqbal* as they were during the *Conley* era, after controlling for relevant variables); Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1014 (showing effect of *Twombly* standard on published opinions regarding employment discrimination cases); Kendall W. Hannon, Note, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1837 (2008) (reporting a civil rights dismissal rate of 41.7% under the pre-*Twombly* standard and 52.9% under *Twombly*, using only reported cases between 2006 and 2007); Statistics Div., Admin. Office of the U.S. Courts, *supra* note 12.

71. At last count, *Iqbal* had been cited in more than fourteen thousand decisions, but this does not tell us much about its impact. After all, most courts are presumably citing *Iqbal* because it is the most recent Supreme Court decision addressing pleading.

72. By "false negative," I mean only that the dismissing body incorrectly assessed the ultimate merit of the complaint. I recognize that most advocates of heightened pleading do not explicitly maintain that courts should be judging the merits of a case at the pleading stage; however, as described above, most heightened pleading supporters assume that it will be most effective in dismissing cases that have no merit. *See supra* text accompanying notes 19–23.

73. This was the instinct of an experienced judge from the Northern District of Illinois who, during an oral argument of a motion to dismiss, expressed the view that defense counsel were overstating *Iqbal*. *See* Transcript of Proceedings Before the Honorable Milton I. Shadur at 2, Madison v. City of Chicago, No. 09 C 3629 (Aug. 10, 2009). Judge Shadur also has referred to the defense bar's penchant for summary judgment motions as

even decrease) after a case like *Iqbal*, this could obscure the fact that a broader range of cases are being subject to dismissal than before. Finally, using only published opinions to examine changes in the rate of dismissal, as some scholars have done, creates potentially serious problems of selection bias.[74]

This paper takes a different approach by looking backwards at a subset of cases litigated during the *Conley* era. Much like a retrospective cohort study, used by epidemiologists to study the relationship between a particular exposure and a health outcome, the design I use here seeks to identify whether there is a relationship between sparse pleading and the merit of a case (as measured by the case's ultimate outcome).[75] The methodology was comprised of three steps: first, I looked to appellate cases decided during the years 1990 to 1999 to identify a set of cases in which the pleadings would likely be subject to dismissal under an *Iqbal*/*Twombly* standard, but which were considered sufficient under *Conley*'s liberal rule; second, I followed those cases after they had been remanded to the district court to determine their ultimate resolution, generating an estimate of the "success"[76] of thinly pleaded cases during this time period; and third, I compared the rate of success in the thinly pleaded cases I identified with the success of all cases litigated during the same time period for which there are records supplied by the Administrative Office of the United States Courts ("Administrative Office"). Each of these steps has specific methodological considerations and difficulties.

The process of identifying cases in which the pleadings are particularly thin is amenable to several approaches. Perhaps the most comprehensive would be to review all district court case files, or a representative sample, and subject the pleadings to a de novo reading by civil procedure experts. This methodology, while offering the potential for inclusiveness, was rejected because it poses certain interpretive problems, particularly with regard to how to decide exactly how "thin" a pleading is. In addition, because this approach does not account for judicial

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"Pavlovian," so perhaps it should be no surprise that he is concerned that motions to dismiss will become similarly routine. *See* Milton I. Shadur, *An Old Judge's Thoughts*, CBA RECORD (Chi. B. Ass'n, Chi., Ill.), Jan. 2004, at 27, 27.

74. *See* Clermont & Yeazell, *supra* note 16, at 839 n.66 (detailing potential selection bias in the Hatamyar, Seiner, and Hannon studies).

75. *See generally* CHARLES H. HENNEKENS & JULIE E. BURING, EPIDEMIOLOGY IN MEDICINE 153–56 (Sherry L. Mayrent ed., 1987) (providing a general discussion of the use of cohort studies in epidemiology). In brief, a retrospective cohort study attempts to determine the relationship between an exposure and a disease by looking at exposed and unexposed individuals and calculating the prevalence of a particular health outcome in each group. *Id.* at 154. In prospective studies, researchers follow exposed and unexposed individuals, sometimes tightly controlling the level of exposure, and determine health outcomes. *Id.* at 154–55. In case-control studies, researchers first identify individuals with and without disease and then determine the level of exposure to a particular determinant within each group. *Id.* at 156.

76. The difficulty of settling on a precise measure of success is discussed in more detail below, *see infra* text accompanying notes 93–102, 146–59, but compared to most empirical studies, I have defined success narrowly as either a judgment or a settlement. *See, e.g.*, Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 726–27 (1988) (including voluntary dismissals and dismissals for failure to prosecute, along with settlements and judgments, as successful outcomes).

perceptions of thinness, this methodology would most likely fail to capture the feature of *Iqbal* that depends on judges' assessments of plausibility, based on their common sense and judicial experience.

Instead of a randomized or comprehensive case selection process, I attempted to use a search method that would identify that subset of cases most likely to be vulnerable to dismissal based on the pleading principles articulated in *Iqbal* and *Twombly*. Such cases were identified in the following manner. First, I reviewed every appellate case announced between January 1, 1990, and January 1, 2000, in which *Conley* was cited as authority for any proposition.[77] Of these cases, those in which a motion to dismiss had been granted in the lower court were selected for study. Those cases in which the dismissal was affirmed were not considered, because there is no way of determining their ultimate merit, similar to the previously mentioned difficulty in determining the impact of *Iqbal* and *Twombly*. Of those cases in which the dismissal was reversed, care was taken to identify whether the basis for reversal was a ground that would be in jeopardy because of the *Iqbal*/*Twombly* pleading standard. For instance, if an appellate court reversed because the district court had disregarded an allegation as being too conclusory due to the fact that it simply mirrored the elements of a cause of action, the case was considered part of the cohort.[78] If a dismissal was reversed because the appellate court stated that the district court considered alternative explanations for the conduct at issue that were not found in the complaint, the case was considered to be part of the cohort.[79] Similarly, if a dismissal was reversed because the complaint contained a bald allegation of state of mind or conspiracy, with no other factual support, it was included in the cohort.[80] And finally, if the appellate court relied on the language from *Conley* that *Twombly* unceremoniously "retired"—that is, that a

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77. I used Westlaw's KeyCite function to accomplish this. I included both published and unpublished appellate decisions in the sample.

78. *See, e.g.*, Yamaguchi v. U.S. Dep't of the Air Force, 109 F.3d 1475, 1481 (9th Cir. 1997) (reversing dismissal in employment discrimination claim where plaintiff's complaint was "inartfully crafted, [but] in light of the liberal pleading standards, . . . presents an adequate claim of sex discrimination"). This approach to resolving pleading questions seems to be called into question by *Iqbal*. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

79. *See, e.g.*, Northington v. Jackson, 973 F.2d 1518, 1522 (10th Cir. 1992) ("In this case the district court did not consider any potential legal issues which arise from [plaintiff]'s allegations. Instead, it foreclosed legal analysis by concluding that the allegations were false, and it based this determination on [defendant]'s testimony at the telephonic evidentiary hearing."). These cases were included in the cohort because under *Iqbal*, district courts are encouraged to rely on their "judicial experience and common sense" to consider alternative explanations for the conduct alleged in a plaintiff's complaint, even if such explanations are found outside of the pleadings. *See Iqbal*, 129 S. Ct. at 1950.

80. *See, e.g.*, *In re* Johannessen, 76 F.3d 347, 350 (11th Cir. 1996); Atchinson v. Dist. of Columbia, 73 F.3d 418, 423 (D.C. Cir. 1996) (finding allegation of municipal liability under § 1983 sufficient where plaintiff alleged a single instance of misconduct and a conclusory allegation of failure to train). These allegations were sufficient under *Conley* but are almost certainly now insufficient under *Iqbal* and *Twombly*. *See Iqbal*, 129 S. Ct. at 1954 (rejecting the argument that state of mind allegations can be made generally); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 565 n.10 (2007) (holding that bare allegation of conspiracy is insufficient without more to establish this element of an antitrust claim).

reviewing court was to imagine whether the plaintiff could prove "any set of facts" consistent with liability prior to dismissal—it was included in the study.[81] Each of these determinations was difficult to make and decisions at the borders would surely invite debate.[82]

There were many reasons to use this method of case selection. First, it was assumed that an appellate court's citation of *Conley* was meant to emphasize the notice aspect of Rule 8 pleading, given *Conley*'s standing at the time. Presumably, one could have looked to appellate cases that cited other authority also associated with notice pleading—for example, *Hishon v. King & Spalding*[83] or *Cruz v. Beto*[84]—but *Conley* has long been a symbol of notice pleading;[85] there is no reason to think that there would be a merits-based difference between cases that elicit an appellate court to cite *Conley* in support of reversal as opposed to some other notice pleading precedent.[86] At the same time, not every citation of *Conley* indicates that the appellate decision would be in tension with the *Iqbal*/*Twombly* rule. Thus, close review of the appellate court's decision-making process was necessary to specifically identify those cases in tension with *Iqbal* and *Twombly*. Importantly, the review of these cases for their inclusion in the cohort was performed prior to conducting any follow-up of the cases on remand. This mitigates any concern that the initial review for inclusion in the cohort was not "blind" to outcome.[87]

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81. *Twombly*, 550 U.S. at 561–63.

82. For instance, if an appellate court referred to the "any set of facts" language but addressed the legal status of a particular cause of action rather than the sufficiency of the pleadings, the case was not considered part of the cohort. *See, e.g.*, Enweremadu v. Reichlin, No. 92-1845, 1993 WL 311914, at *3 (4th Cir. Aug. 8, 1993) (holding that the district court erred in dismissing the action because the complaint cited only the Fourth Amendment and not the Fourteenth Amendment). In any event, anyone wishing to test the validity of the judgments made about each case can review the cases as they are clearly identified below. *See infra* Appendix, Table 1.

83. 467 U.S. 69 (1984).

84. 405 U.S. 319 (1972) (per curiam).

85. This is reflected in citation counts for the three cases. According to Westlaw's KeyCite feature, over the specified time period, *Cruz* was cited in 108 appellate decisions, *Hishon* was cited in almost 250 appellate cases, and *Conley* was cited in 867 appellate cases. If one limits the citations to pleading-related headnotes (which is admittedly putting a high degree of faith in Westlaw's editors), *Cruz* was cited in 38 cases, *Hishon* in 197, and *Conley* in 845.

86. There might, of course, be a difference in the kind of case that elicits a *Conley* citation versus, say, a *Cruz* citation. *Conley* was a discrimination case, and *Cruz* was a prisoners' rights case. Therefore, one might expect that appellate courts considering prisoner appeals would be more likely to cite *Cruz* than *Conley* in support of reversal. This difference might affect the proportion of prison cases in the sample, but there is no reason to think that prisoner cases that elicit a *Conley* citation are more or less likely to be meritorious than prisoner cases that elicit a *Cruz* citation. Nonetheless, for future research it might be useful to include appellate decisions citing to *Cruz* and *Hishon*, if only to increase the sample size.

87. One should always attempt to minimize observation bias in empirical studies, and "blinding" researchers to outcomes is one approach to such minimization. *See* HENNEKENS & BURING, *supra* note 75, at 192 (discussing blinding in the context of health intervention studies).

It would be possible to expand the cohort by adding all district court decisions in which a motion to dismiss was denied in the first instance, and in which *Conley*'s disfavored language was cited by the district court.[88] Including these cases may be more comprehensive and eliminate some of the selection biases that might pervade the focus on appellate courts.[89] On the other hand, because the cases that will be dismissed under the *Iqbal*/*Twombly* pleading standard will likely be on the margins of what was considered sufficient pleading under *Conley*, selecting cases through appellate reversals has the advantage of identifying cases in which judicial actors disagreed about the sufficiency of the pleading under *Conley*. In any event, the results reported here argue in favor of broader testing of the empirical inquiry, whether through expanding the cohort of appellate cases examined or through direct sampling from district court cases.

Once the cohort was identified, the second methodological step was to determine the ultimate outcome of all cases included in the cohort. As a technical matter, this was relatively straightforward. I consulted electronic dockets maintained by the Public Access to Court Electronic Records (PACER)[90] website, which recorded most outcomes, and when necessary I contacted specific attorneys or litigants to clarify lingering uncertainties. Cases were divided into the following outcome categories: (1) judge or jury verdict, (2) settlement, (3) stipulated dismissal, (4) summary judgment, (5) involuntary dismissal, and (6) other.[91] No distinction was made between judge and jury verdicts, because the presumption of the study is that a fact finder's conclusion is dispositive of the merits of the case.[92]

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88. Such cases would be identified not by using appellate decisions as a filter, but by searching district court opinions directly.

89. *See infra* Part IV.C.

90. PACER Serv. Ctr., Admin. Office of the U.S. Courts, PACER: PUB. ACCESS TO COURT ELEC. RECORDS, http://www.pacer.gov/.

91. In addition to coding the cases for outcome, coding was made for the following categories: circuit, district, year of filing, year of resolution, pro se status on appeal, pro se status on remand, case type (by Administrative Office code), and case type (descriptive). The code for case type consisted of the following categories: antitrust, civil rights (nonprisoner), civil rights (prisoner), consumer, contract, employment discrimination, ERISA, RICO, securities fraud, and tort. Only nine cases could not be coded according to these categories and were lumped together as "other."

92. This presumption is subject to dispute, and some have certainly argued that juries are not reliable fact finders. *See, e.g.*, Elliott M. Abramson, *The Medical Malpractice Imbroglio: A Non-Adversarial Suggestion*, 78 KY. L.J. 293, 294 (1990) (criticizing malpractice juries for basing verdicts on sympathy for injured party); David E. Bernstein, *Learning the Wrong Lessons from "An American Tragedy": A Critique of the Berger-Twerski Informed Choice Proposal*, 104 MICH. L. REV. 1961, 1975 (2006) (expressing concern regarding the role played by juror sympathies in cases involving birth defects); Peter A. Drucker, *Class Certification and Mass Torts: Are "Immature" Tort Claims Appropriate for Class Action Treatment?*, 29 SETON HALL L. REV. 213, 222–23 (1998) (describing ways juries can be misled in toxic tort cases). *But see* ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL 31 (2009) ("The moral sources that are actualized at trial exist in the life world of the jurors. They are the negotiated truths that made a certain way of life possible. They are not arbitrary; neither is a decision derived from them, duly actualized and refined. Least of all is it 'purely emotional.'"); Rachel E. Barkow, *Recharging the Jury: The*

The settlement and stipulated dismissal categories are relatively straightforward. However, it should be noted that, while most empirical studies categorize stipulated dismissals and voluntary dismissals together for the purposes of judging ultimate success,[93] this study has not. Only judgments for the plaintiff, settlements, or stipulated dismissals are considered successful resolutions in this study, because in each of these circumstances there is the assurance (or the strong indication) that a plaintiff has received something of value through litigation. Efforts were made in every case to confirm, by personal communication with counsel or a litigant, whether stipulated dismissals in fact represented settlements by another name. But the underlying assumption is that a settlement is a successful outcome, and that successful outcomes are suggestive of merit.[94]

Reliance on settlement as reflecting the merit of a lawsuit is not without its risks. There are many who argue that some percentage of settlements are coercive and are not indicative of the underlying merit of the plaintiff's position.[95] On the other hand, some researchers quite reasonably maintain that counting settlements and verdicts but not including voluntary dismissals ignores the arguably safe assumption that a plaintiff would not agree to dismiss a case without obtaining something of value in return.[96] The view that settlements are often the result of

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Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing, 152 U. PA. L. REV. 33, 78 (2003) (defending the need for a jury even in the face of criticisms that verdicts are the product of emotion and sympathy). For those who believe that jury verdicts are often the product of irrationality, it is doubtful that any indication of success would be a satisfactorily reliable correlate of merit. Indeed, it is unlikely that any aspect of the project undertaken in this Article would seem worthwhile to one who discounts all jury verdicts as the product of irrationality.

93. *See, e.g.*, Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1592–93 (2003); Schwab & Eisenberg, *supra* note 76, at 726–27.

94. There may be many reasons that a defendant enters into a settlement agreement, some of which reflect a judgment about merit and some of which reflect other concerns. *See infra* notes 148–55 and accompanying text.

95. *See, e.g.*, Patrick E. Longan, *The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials*, 35 ARIZ. L. REV. 663, 684–85 (1993) (distinguishing between just and unjust settlements, with the latter the result of coercion such as unequal bargaining power). Much of the academic commentary has focused on class action litigation. *See, e.g.*, John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 878 (1987); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 387–88 (2005) (describing class action decertification decisions that are motivated in part by concern that certification will leave defendants with no choice but to settle). Some commentators have used strong language indeed, comparing settlements obtained after certification decisions to blackmail. *See* Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377 (2000). *But see* Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 840 (2004) (suggesting that settlement of recent employment class action discrimination claims was driven by "strong evidence on the merits").

96. *Compare* Schwab & Eisenberg, *supra* note 76, at 727–28 (explaining, with caveats, reliance on voluntary dismissals), *with* Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1309–11 (2005) [hereinafter Hadfield, *Civil Litigation*] (auditing Administrative Office coding of voluntary

coercion is founded at least in part on the assumption that plaintiffs often file suit for trivial or nonexistent grievances, in the hope of obtaining a favorable settlement without expending substantial cost.[97] This assumption, however, is inconsistent with social science data that suggest that the vast majority, approaching ninety percent, of legally cognizable grievances are never brought to court.[98] It is thus fair to assume that the disputes in which litigation is initiated often reflect grievances that are perceived to be real and worthy of the high cost of litigation. There are also good reasons to think that those cases that are settled are mostly cases in which there is substantial agreement between the parties as to the likely outcome of the case were it to litigate to judgment, at least where the parties have a relatively accurate sense of the damages that are at stake.[99] This is particularly true for cases that are settled after discovery has terminated, because in that posture, both parties have access to the full spectrum of information that will likely be produced at trial.[100]

In some sense, I can be agnostic on whether settlements are reflective of the validity of a claim. I have, in the past, used voluntary dismissals as a relevant indication of success,[101] and there is merit in doing so.[102] My agnosticism is driven more by the fact that, however one defines success, any comparisons should be made using the same measure. Thus, what indicator one uses for success is less important than ensuring that one uses the same indicators of success across the two comparison cohorts.[103]

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and other dismissals and finding that they are not closely correlated with settlements) *and* Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705 (2004) [hereinafter Hadfield, *Trials*] (finding errors in general Administrative Office coding).

97. *See generally* Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1850 & n.1 (2004) (summarizing literature and stating that "[t]o employ a nuisance-value strategy, a litigant asserts a plainly meritless claim or defense in order to extract a payoff based on the cost the other party would incur to have the claim or defense dismissed by the court under a standard dispositive motion, like summary judgment").

98. David M. Trubek, Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer & Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 86–87 (1983) (relying on study of disputes in "eight selected general areas—tort, consumer, debt, discrimination, property, government, post-divorce and landlord-tenant"). *See generally* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991) (describing a system of informal dispute resolution in the cattle industry); Robert J. Rhee, *Tort Arbitrage*, 60 FLA. L. REV. 125, 129 (2008) (remarking that most disputes are resolved without a lawsuit being filed).

99. *See* Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 138 (2002).

100. Most of the settlements or stipulated dismissals in the cohort of cases studied here took place after discovery was complete. *See infra* notes 152–54 and accompanying text.

101. Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 833 (2010).

102. *See, e.g.*, Schwab & Eisenberg, *supra* note 76, at 727–28.

103. This principle only goes so far. It is hard to consider a case that is transferred to another district as successful or unsuccessful, at least in the sense that one means to study something about the merit of the claims being transferred.

This brings me to the final step of the analysis: comparing the rate of success in this cohort with the general rate of success among all cases resolved during this time period. The principal source of comparison—the "control" group, for lack of a better term—was created from the Administrative Office's database of civil cases terminated between 1990 and 2000.[104] There are well-discussed problems with relying solely on the Administrative Office's database,[105] so I have supplemented the Administrative Office data with more specific and arguably more reliable data generated by other researchers.[106] In addition to comparing success rates at a cohort and control-wide level, I also make comparisons based on pro se status and case subject matter.

III. RESULTS

This section reviews the results of the study in two sections. First, I present the data relevant to the cohort in Part A. In Part B, I discuss the principal "control" group, the data gathered by the Administrative Office between 1990 and 2000. Throughout, I discuss the relevant comparisons between the two groups, supplemented by data provided by other researchers.

A. Cohort Characteristics

Of a total of 843 appellate decisions in which *Conley* was cited by a court, 745 involved decisions reviewing a motion to dismiss determination by a district court.[107] In 303 of these cases, the appellate court reversed the decision below and

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104. *See* Federal Judicial Center, Federal Court Cases: Integrated Data Base, 1970–2000 (computer file, on file with the author), *available at* http://dx.doi.org/10.3886/ICPSR08429. The database (in its entirety or a selected portion) can be downloaded from the Inter-University Consortium for Political and Social Research. After downloading only the civil terminations files from 1990 to 2000 (datasets 73, 74, 86, 87, 88, 98, 103, 104, 115, 116, and 117), I converted the text files for use in Stata/SE 10.1 and generated the data that I will describe below. The Administrative Office data, being both expansive and publicly available, are not included in the Appendix, but the converted files I used for analysis are available on request. Eisenberg and Clermont also offer a useful online service that permits users to run certain queries of the database. Theodore Eisenberg & Kevin M. Clermont, JUDICIAL STATISTICAL INQUIRY, http://legal1.cit.cornell.edu:8090/.

105. *See* Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455, 1460 (2003); Hadfield, *Civil Litigation*, *supra* note 96, at 1310–11; Schlanger, *supra* note 93, at 1600 n.129.

106. *See infra* notes 135–37 and accompanying text.

107. Federal Circuit cases were excluded from consideration because of the specialized nature of the court. *See* 28 U.S.C. § 1295 (defining the jurisdiction of the Federal Circuit); *Court Jurisdiction*, U.S. CT. OF APPEALS FOR FED. CIRCUIT, http://www.cafc.uscourts.gov/index.php?option=com_content&view=article&id=144&Itemid=27 (reporting that more than half of Federal Circuit cases involve administrative law, 31% involve intellectual property, and 11% involve damages claims against the United States government). Between 1990 and 1999, only twenty-three appellate cases in which *Conley* was cited came from the Federal Circuit, and only nineteen of these involved appeals of disposition of motions to

remanded for further proceedings. There are moderate to extreme variations in reversal rates by circuit and year of decision, as reflected in Tables 1 and 2. Fisher exact testing[108] was conducted comparing reversal rates within each circuit to the reversal rate of all other circuits combined, with the First, Sixth, Seventh, and Tenth Circuits reporting significantly lower reversal rates and the Second, Third, and Eleventh Circuits reporting significantly higher reversal rates.[109] When one considers reversal rates by year, there is less variation, with reversal rates in 1990 being significantly lower than all other years combined, and reversal rates in 1992 being significantly higher.[110]

Table 1: Reversal Rates, by Circuit[111]

Jurisdiction	**Reversed (%)**	**Affirmed (%)**	**Total**
Supreme Court	3 (100%)	0 (0%)	3
First Circuit[a]	8 (25%)	24 (75%)	32
Second Circuit[a]	53 (60.23%)	35 (39.77%)	88
Third Circuit[b]	9 (64.29%)	5 (35.71%)	14
Fourth Circuit	18 (41.86%)	25 (58.14%)	43
Fifth Circuit	21 (33.33%)	42 (66.67%)	63
Sixth Circuit[a]	27 (31.03 %)	60 (68.97%)	87
Seventh Circuit[a]	64 (35.16%)	118 (64.84%)	182
Eighth Circuit	17 (43.59%)	22 (56.41%)	39
Ninth Circuit	36 (47.37%)	40 (52.63%)	76
Tenth Circuit[a]	18 (27.69%)	47 (72.31%)	65
Eleventh Circuit[a]	16 (59.26%)	11 (40.74%)	27
D.C. Circuit	13 (50%)	13 (50%)	26
Total	**303 (40.67%)**	**442 (59.33%)**	**745**
[a]: $t<0.05$, Fisher exact probability test, one-tailed; [b]: $t<0.10$, Fisher exact probability test			

dismiss. Of these nineteen, ten of the circuit decisions vacated or reversed a lower court decision dismissing a complaint.

108. Where feasible, Fisher exact testing is usually preferable to estimating variance by chi-square testing. Robert Timothy Reagan, *Federal Judicial Center Statistical Examples Software Prototype: Age Discrimination Example*, 42 JURIMETRICS 281, 288 (2002).

109. Clermont and others have reported some variation in reversal rates by circuit in employment discrimination cases over a similar time frame. Kevin M. Clermont, Theodore Eisenberg & Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547, 561 Display 7 (2003).

110. *See infra* Table 2; *infra* Figure 2. There is no obvious explanation for these differences; there was no intervening legal change or Supreme Court decision between 1990 and 1992 that would explain a significantly higher reversal rate in the latter.

111. Excluded from consideration are cases in which dismissals were not considered on appeal. Thus, if *Conley* were cited in reviewing a jury verdict or summary judgment, it was not included in the analysis of this study. Overall, only ninety-seven cases fell into this category, or 11.5%. There was some variation by circuit: in the Supreme Court, three cases (50%) were not pleading cases, one in the First Circuit (3.03%), seven in the Second (7.37%), six in the Third (30%), seven in the Fourth (14%), eleven in the Fifth (14.86%), six in the Sixth (6.45%), ten in the Seventh (5.21%), two in the Eighth (4.88%), twenty in the Ninth (20.83%), nine in the Tenth (12.16%), ten in the 11th (27.03%), and five in the D.C. Circuit (16.13%).

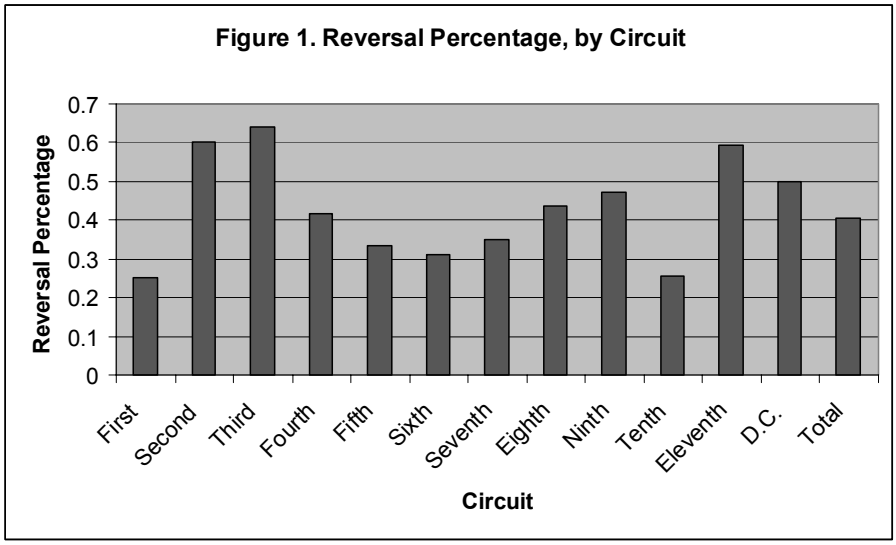
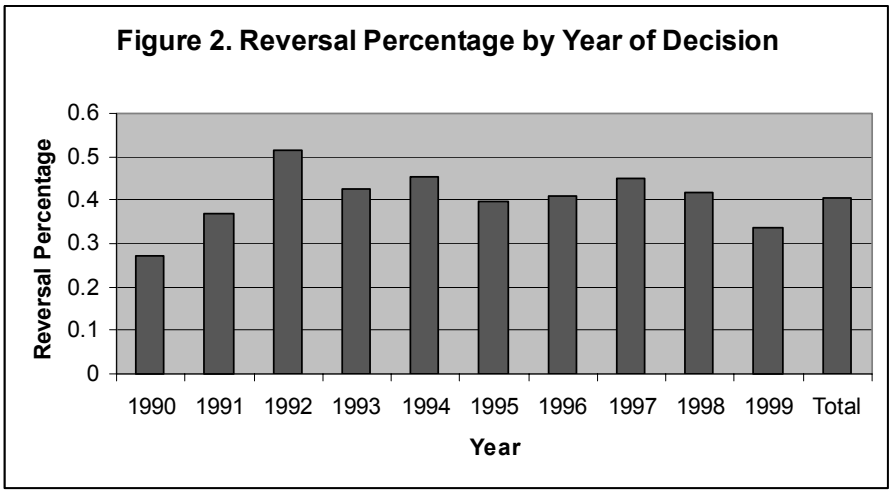


Table 2. Reversal Rates, by Year

Year	Reversed (%)	Affirmed (%)	Total
1990[a]	15 (27.27%)	40 (72.73%)	55
1991	33 (37.08%)	56 (62.92%)	89
1992[a]	32 (51.61%)	30 (48.39%)	62
1993	39 (42.39%)	53 (57.61%)	92
1994	44 (45.36%)	53 (54.64%)	97
1995	31 (39.74%)	47 (60.26%)	78
1996	23 (41.07%)	33 (58.93%)	56
1997	27 (45%)	33 (55%)	60
1998	33 (41.77%)	46 (58.23%)	79
1999	26 (33.77%)	51 (66.23%)	77
Total	**303 (40.67%)**	**442 (59.33%)**	**745**

[a]: $t<0.05$, Fisher exact probability test, one-tailed



Of the cases in which a lower court's dismissal of a complaint was reversed, slightly more than half[112] can be clearly categorized as what I will refer to as "*Conley*-based reversals"—that is, reversals that rested on the broad reading of *Conley* that was rejected by *Iqbal* and *Twombly*. Again, there is a significant amount of inter-circuit variation in the percentage of reversals that are categorized as based on *Conley*. As described above, these cases were identified by a close inspection of the reasoning of the reversing court and the appellate court's description of the pleadings at issue. For example, excluded from consideration were reversals based on legal conclusions such as standing or whether a statute created a cause of action.[113] On the other hand, reversals that explicitly accepted the truth of pleadings that the appellate court itself described as "conclusory"[114] or "sparse" were generally included in the cohort of *Conley*-based reversals.[115] And any appellate decision that explicitly rested its holding on the broad language of *Conley* "retired" by *Twombly*—that a court must deny a motion to dismiss if it can imagine "any set of facts" that establishes the defendant's liability—was included in the cohort.

112. *See infra* Table 3.

113. *See, e.g.*, Comrie v. Bronx Lebanon Hosp., No. 97-7484, 1998 WL 29643 (2d Cir. Jan. 27, 1998); B.F. Goodrich v. Betkoski, 99 F.3d 505 (2d Cir. 1996); Finlator v. Powers, 902 F.2d 1158 (4th Cir. 1990).

114. *See, e.g.*, Addams v. City of Chicago, No. 92-4036, 1994 WL 64332, at *3 (7th Cir. Mar. 2, 1994).

115. *See, e.g.*, IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049 (2d Cir. 1993).

Table 3. *Conley*-Based Reversals, by Circuit

Jurisdiction	Conley Reversals (%)	Total Reversals
Supreme Court	2 (66.7%)	3
First Circuit[b]	2 (25.0%)	8
Second Circuit[b]	35 (66.0%)	53
Third Circuit	4 (44.4%)	9
Fourth Circuit	13 (72.2%)	18
Fifth Circuit	11 (52.4%)	21
Sixth Circuit	13 (48.2%)	27
Seventh Circuit	37 (57.8%)	64
Eighth Circuit[a]	5 (29.4%)	17
Ninth Circuit	22 (61.1%)	36
Tenth Circuit	8 (44.4%)	18
Eleventh Circuit	7 (43.8%)	16
D.C. Circuit	9 (69.2%)	13
Total	**168 (55.5%)**	**303**
[a]: $t<0.05$, Fisher exact probability test, one-tailed; [b]: $0.05<t<0.10$, Fisher exact probability test		

Of the 168 cases that were reversed on *Conley* grounds, 137 were able to be coded as successful or unsuccessful.[116] Of these, seventy-six, or 55.5%, were classified as successful, and sixty-one, or 44.5%, were classified as unsuccessful. The breakdown of outcomes is detailed in Table 4.

116. For any case that could not be coded as successful or unsuccessful, I have made every attempt to reach out to the litigants or attorneys involved. Many of the cases were terminated over ten years ago, making follow-up difficult. Of the cases that could not be coded as successful or unsuccessful, it is likely that at least fourteen of them involved settlements, but this has not yet been confirmed. Thus, if they were added to the cohort, and the additional cases lost to follow-up were all presumed to be unsuccessful, the success rate would change to 53.5%.

Table 4. *Conley*-Based Reversals, by Ascertainable Outcome[117]

Outcome	Cases	Frequency
Successful		
Settled	49	35.7%
Stipulated Dismissal (Settlement)	21	15.3%
Plaintiff Verdict	3	2.2%
Other	3	2.2%
Total Successful	**76**	**55.5%**
Unsuccessful		
Dismissal	12	8.8%
Summary Judgment	36	26.3%
Defendant Verdict	11	8.0%
Other	2	1.5%
Total Unsuccessful	**61**	**44.5%**
Total Cases	**137**	

Tables 5 and 6 break the cohort down according to case type, both descriptively[118] and by the "nature of suit" indicated by the plaintiff on the civil cover sheet provided by the Administrative Office.[119] Notably, civil rights cases, including employment discrimination cases, comprised more than half of the cohort.[120] And antitrust and securities fraud cases together made up almost 10% of the cohort. The success rate of civil rights cases is even more notable when one appreciates the extent to which most pro se litigants were concentrated in those case categories. As Table 7 demonstrates, thirty-one, or 22.6%, of the *Conley* reversed cases were litigated by prisoners who were pro se on remand in the district court.[121] Of these thirty-one pro se litigants, only three, or just under 10%, were successful, but twenty-nine were involved in civil rights cases, including

117. *See infra* Appendix Table 2 for the raw data upon which this table is based.

118. For each *Conley*-based reversal, I summarized the nature of the case according to the terms in Table 5.

119. The Civil Cover Sheet used by most districts can be found at http://www.uscourts.gov/forms/JS044.pdf.

120. The percentage of employment discrimination cases is consistent with national figures, as employment discrimination cases have grown to be the category comprising the largest single percentage of the federal civil docket, currently around 10%. Clermont & Schwab, *supra* note 29, at 429. This explosion began in the 1990s, thought to be due in part to the passage of the Civil Rights Act of 1991, along with the Americans with Disabilities Act of 1990 and the Family and Medical Leave Act of 1993. *Id.* at 433 (noting that the 1991 Act added the right to a jury trial and compensatory and punitive damages, among other relief). Clermont and Schwab note that, notwithstanding the availability of the ADA and the FMLA, Title VII is the driving force behind employment discrimination claims because almost 70% of employment discrimination cases arise under Title VII. *Id.*

121. Some litigants were pro se on appeal, but were granted motions for appointment of counsel after reversal. *E.g.*, Zarnes v. Rhodes, 64 F.3d 285 (7th Cir. 1995).

employment discrimination.[122] Thus, as Table 9 reflects, when only counseled cases are considered, the success of civil rights cases, including employment discrimination cases, jumps considerably. As will be discussed below, this is consistent with other research demonstrating a positive correlation between ultimate success and the assistance of counsel.[123] In addition, any statistically significant differences between the success of these case types and the rest of the cohort disappear, such that only securities fraud cases continue to have a statistically significant higher success rate.

Table 5. *Conley*-Based Reversals, by Case Type and Success

Case Type	Success (%)	Unsuccessful (%)	Total (%)
Tort	6 (46.2%)	7 (53.8%)	13 (9.5%)
Contract[b]	6 (85.7%)	1 (14.3%)	7 (5.1%)
Employment Discrimination	14 (66.7%)	7 (33.3%)	21 (15.3%)
Prison[a]	5 (21.7%)	18 (78.3%)	23 (16.8%)
Antitrust[b]	7 (87.5%)	1 (12.5%)	8 (5.8%)
Non-Prison Civil Rights	17 (48.6%)	18 (51.4%)	35 (25.5%)
Consumer	3 (60%)	2 (40%)	5 (3.6%)
RICO	2 (50%)	2 (50%)	4 (2.9%)
Sec. Fraud[a]	6 (100%)	0	6 (4.3%)
ERISA	3 (100%)	0	3 (2.1%)
Other	7 (58.3%)	5 (41.7%)	12 (8.8%)
Total	**76 (55.5%)**	**61 (44.5%)**	**137**
[a]: $t<0.05$, Fisher's exact test, one-tailed; [b]: $0.05<t<0.10$, Fisher's exact test, one-tailed			

122. *See infra* Table 8. The percentage of employment discrimination cases proceeding pro se is not all that different from what has been reported over the same time period for all employment cases. Clermont & Schwab, *supra* note 29, at 434 tbl.1 (showing that almost 17% of employment discrimination plaintiffs proceeded pro se in district court between 1998 and 2001); *id.* app. at 457 (reporting that 19.8% of employment discrimination plaintiffs proceeded pro se between 1979–2000, with 25.95% of non–employment discrimination plaintiffs proceeding pro se, and 3.15% of contract and tort plaintiffs proceeding pro se).

123. *See* Theodore Eisenberg & Stewart J. Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 692 (1987); Schwab & Eisenberg, *supra* note 76, at 770–71, 773–74. As with other studies, these data do not show that having an attorney causes an increase in success. It may just as well be the case that the merit of a litigant's case makes it more likely that an attorney will agree to represent her.

Table 6. *Conley*-Based Reversals, by Administrative Office Code and Outcome

AO Code	Successful (%)	Unsuccessful (%)	Total
110 (Insurance)	1 (100%)	0	1
120 (Marine Contract)	1 (100%)	0	1
140 (Neg. Instr.)	1 (100%)	0	1
190 (Contract)	6 (85.7%)	1 (14.3%)	7
245 (Tort Prod. Liab.)	1 (100%)	0	1
320 (Assault, Libel)	1 (100%)	0	1
340 (Marine PI)	1 (100%)	0	1
360 (Other PI)	5 (62.5%)	3 (37.5%)	8
362 (Med. Mal.)	0	1 (100%)	1
370 (Other Fraud)	1 (50%)	1 (50%)	2
371 (TILA)	1 (100%)	0	1
410 (Antitrust)	6 (85.7%)	1 (14.3%)	7
422 (Bank Appeal)	2 (100%)	0	2
430 (Banks)	0	1 (100%)	1
440 (Civ. Rights)	17 (51.5%)	16 (48.5%)	33
442 (Civ. Rights Jobs)	8 (61.5%)	5 (38.5%)	13
443 (Civ. Rights Accom.)	3 (75%)	1 (25%)	4
470 (Civil RICO)	4 (80%)	1 (20%)	5
550 (Prisoner-Civ. Rights)	5 (23.8%)	16 (76.2%)	21
710 (FLSA)	1 (100%)	0	1
720 (LMRA)	0	1 (100%)	1
790 (Other Labor)	0	1 (100%)	1
791 (ERISA)	3 (75%)	1 (25%)	4
820 (Copyright)	0	1 (100%)	1
840 (Trademark)	1 (100%)	0	1
850 (Securities)	4 (100%)	0	4
890 (Other Statutory)	3 (33.3%)	6 (66.7%)	9
895 (FOIA)	0	2 (100%)	2
950 (State Statute Constitutionality)	0	2 (100%)	2
Total	**76 (55.5%)**	**61 (44.5%)**	**137**

Table 7. *Conley*-Based Reversals, by Pro Se Representation and Outcome

Representation in District Court	Successful (%)	Unsuccessful (%)	Total
Counseled[a]	73 (68.9%)	33 (31.1%)	106
Pro Se[a]	3 (9.6%)	28 (90.4%)	31
Total	**76 (55.5%)**	**61 (44.5%)**	**137**
[a]: $t<0.05$, Fisher exact probability test, one-tailed			

Table 8. *Conley*-Based Reversals, by Pro Se Status and Case Type

Case Type	Counseled (%)	Pro Se (%)	Total
Tort	11 (84.6%)	2 (15.4%)	13
Contract	7 (100%)	0	7
Employment Discrimination	18 (85.7%)	3 (14.3%)	21
Prison	7 (30.4%)	16 (69.6%)	23
Antitrust	8 (100%)	0	8
Non-prison civil rights	25 (71.4%)	10 (28.6%)	35
Consumer	5 (100%)	0	5
RICO	4 (100%)	0	4
Sec Fraud	6 (100%)	0	6
ERISA	3 (100%)	0	3
Other	12 (100%)	0	12
Total	**106 (77.4%)**	**31 (22.6%)**	**137**

Table 9. *Conley*-Based Reversals, by Case Type and Outcome, Counseled Plaintiffs Only

Case Type	Success (%)	Unsuccessful (%)	Total
Tort	6 (54.5%)	5 (45.5%)	11
Contract	6 (85.7%)	1 (14.3%)	7
Employment Discrimination	14 (77.8%)	4 (22.2%)	18
Prison	3 (42.8%)	4 (57.2%)	7
Antitrust	7 (87.5%)	1 (12.5%)	8
Non-Prison Civil Rights	16 (64.0%)	9 (36.0%)	25
Consumer	3 (60%)	2 (40%)	5
RICO	2 (50%)	2 (50%)	4
Sec Fraud[a]	6 (100%)	0	6
ERISA	3 (100%)	0	3
Other	7 (58.3%)	5 (41.7%)	12
Total	**73 (66.4%)**	**33 (33.6%)**	**110**
[a]: $t<0.10$, Fisher exact probability test, one-tailed			

Thus, the success of the cohort can be briefly summarized as follows. When considered as a whole, the rate of success is about 55%, with settlements and stipulated dismissals accounting for nearly all of the successful outcomes. When considered more closely, the data also reflect high levels of success for certain categories of claims—most notably securities fraud, consumer, and contract claims—as well as a high percentage of civil rights cases within the cohort. And even the civil rights claims achieve a high degree of success, as will be shown by comparison below to other reported data.

B. "Control" Group Characteristics

As explained above, I used civil terminations from the years 1990 to 2000 to serve as a control group for the cohort data. Although there is not a precise overlap in terms of the years covered by the control group and the cohort, the vast majority of cohort cases were resolved between the years 1990 and 2000. The control group, consisting as it does of every civil case terminated during the relevant time frame, is larger than the cohort by several orders of magnitude. In 1991 alone, 193,491 cases were terminated, and over the entire time period slightly more than 2.1 million cases were resolved by the federal courts.[124]

The analysis of the Administrative Office data was conducted in the following manner: For all civil terminations between 1990 and 2000, the disposition and prevailing party were cross-tabulated. Both of these variables can be coded in unilluminating ways—for instance, prevailing party may be coded as "unknown" or "both," and disposition has eighteen different possible codings.[125] Based on the cross-tabulation, dispositions were then divided into four categories: plaintiff's success, defendant's success, uncertain success, and excluded categories.[126] Using only the first three categories, absolute numbers and relative frequencies were calculated for year-by-year dispositions between 1990 and 2000 and for particular types of lawsuits. The year-by-year breakdown of the absolute number of cases that fell within each category is reprinted in the Appendix.[127] Tables 10a, 10b, and 10c reflect the year-by-year breakdown of the outcome frequency within each category, divided according to unsuccessful, successful, and questionable outcomes, respectively.

Comparing these comprehensive data to the success rates observed in the cohort of cases analyzed above, there are several observations to be made. Although there is some significant variation in the overall success rate observed in the Administrative Office data, particularly given the large sample size, the success rate in the *Conley*-reversed cases appears to be well within the range of average success rates of all cases terminated over this time period. Indeed, depending on

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124. *See infra* Appendix Table 3.

125. The inaccuracies of the Administrative Office coding in the databases used here have been remarked on above. *See supra* note 105 and accompanying text; *see also* Hadfield, *Trials*, *supra* note 96 at 723–28 (reporting on an audit of Administrative Office coding errors).

126. The following dispositions were considered clear plaintiff successes: default judgment; consent judgment; jury, directed, or bench verdict for the plaintiff; judgment for plaintiff by pretrial motion; judgment for plaintiff on other grounds; and settlement. Defendant successes comprised the following: verdict for the defendant, both parties, or an unknown party; dismissal for failure to prosecute or for lack of jurisdiction; judgment for defendant or for both parties by pretrial motion; and judgment on other grounds for defendant or for both parties. Uncertain success was defined as voluntary dismissal or other dismissal. Excluded from consideration were the following dispositions: remand to state court; remand to an agency; transfer to a different court or to the Judicial Panel on Multidistrict Litigation, *see* 28 U.S.C. § 1407; judgments enforcing arbitration awards or on de novo trial post-arbitration; stays for bankruptcy proceedings; statistical closings; and dispositions related to magistrate judge appeals.

127. *See infra* Appendix Table 3.

whether voluntary and other dismissals are properly categorized as successes or not, it may be that the success rate in the *Conley*-reversed cases is, on average, higher than in the generality of cases.[128]

128. It is important to caution against drawing too strong a conclusion from these data. Aside from the size of the sample, most of the cohort cases have already overcome a significant procedural hurdle—surviving a motion to dismiss. The same cannot be said of all of the cases in the Administrative Office dataset.

Table 10a. Relative Frequencies, Year-by-Year, Unsuccessful Cases (Administrative Office Dataset)

Disposition (All Cases)	**1990**	**1991**	**1992**	**1993**	**1994**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**	**Total**
Dismissal, Failure to Prosecute	3.99%	3.88%	4.17%	3.75%	3.51%	3.75%	3.82%	3.95%	3.62%	4.13%	3.59%	3.83%
Dismissal, Lack of Jurisdiction	5.52%	2.84%	2.40%	1.81%	1.85%	1.69%	1.66%	1.76%	1.73%	1.83%	1.79%	2.09%
Judgment, Motion Before Trial, Defendant	12.87%	12.76%	12.50%	13.38%	14.84%	16.10%	15.32%	14.51%	13.28%	14.19%	13.02%	13.96%
Judgment, Motion Before Trial, Other	0.56%	0.41%	0.38%	0.40%	0.34%	0.31%	0.32%	0.36%	0.30%	0.28%	0.30%	0.35%
Jury Verdict, Defendant	0.89%	0.84%	0.88%	0.98%	1.07%	1.06%	1.02%	1.06%	0.93%	0.97%	0.82%	0.96%
Jury Verdict, Other	0.06%	0.06%	0.07%	0.06%	0.07%	0.08%	0.07%	0.07%	0.06%	0.05%	0.04%	0.06%
Directed Verdict, Defendant	0.16%	0.14%	0.12%	0.13%	0.11%	0.11%	0.11%	0.10%	0.09%	0.08%	0.06%	0.11%
Directed Verdict, Other	0.00%	0.01%	0.00%	0.01%	0.00%	0.00%	0.01%	0.00%	0.00%	0.00%	0.00%	0.00%
Court Verdict, Defendant	0.93%	0.88%	0.84%	0.84%	0.82%	0.83%	0.67%	0.58%	0.42%	0.40%	0.36%	0.68%
Court Verdict, Other	0.09%	0.09%	0.07%	0.06%	0.06%	0.07%	0.05%	0.05%	0.04%	0.04%	0.04%	0.06%
Judgment on Other Grounds, Defendant	1.83%	2.18%	2.68%	2.99%	3.26%	3.23%	3.02%	2.25%	2.48%	2.60%	2.28%	2.66%
Judgment on Other Grounds, Other	0.81%	0.71%	0.58%	0.38%	0.84%	1.35%	1.70%	1.89%	1.77%	2.03%	2.05%	1.31%
Total	**27.71%**	**24.80%**	**24.69%**	**24.79%**	**26.77%**	**28.58%**	**27.77%**	**26.58%**	**24.72%**	**26.60%**	**24.35%**	**26.07%**

Table 10b. Relative Frequencies, Year-by-Year, Successful Cases (Administrative Office Dataset)

Disposition (All Cases)	**1990**	**1991**	**1992**	**1993**	**1994**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**	**Total**
Default Judgment	7.76%	8.28%	9.34%	5.95%	4.68%	4.08%	4.52%	5.62%	6.59%	8.58%	9.51%	6.71%
Consent Judgment	3.82%	3.50%	3.96%	3.08%	2.36%	2.04%	2.04%	2.08%	2.02%	2.56%	2.44%	2.65%
Judgment, Motion Before Trial, Plaintiff	3.72%	3.53%	3.24%	3.13%	2.62%	2.44%	2.25%	2.22%	2.09%	2.19%	2.12%	2.63%
Jury Verdict, Plaintiff	0.79%	0.85%	0.78%	0.70%	0.75%	0.69%	0.69%	0.69%	0.62%	0.62%	0.53%	0.70%
Directed Verdict, Plaintiff	0.12%	0.11%	0.02%	0.03%	0.03%	0.02%	0.02%	0.01%	0.01%	0.01%	0.01%	0.03%
Court Verdict, Plaintiff	0.70%	0.63%	0.59%	0.54%	0.53%	0.43%	0.38%	0.35%	0.33%	0.34%	0.32%	0.45%
Judgment on Other Grounds, Plaintiff	0.73%	0.94%	1.28%	1.25%	1.03%	0.93%	0.90%	0.85%	0.73%	0.78%	0.70%	0.93%
Settlement	27.70%	26.35%	26.25%	28.52%	27.47%	25.71%	24.99%	25.40%	24.51%	28.41%	26.30%	26.41%
Total	**45.34%**	**44.19%**	**45.46%**	**43.20%**	**39.47%**	**36.34%**	**35.79%**	**37.22%**	**36.90%**	**43.49%**	**41.93%**	**40.51%**

Table 10c. Relative Frequencies, Year-by-Year, Questionable Cases (Administrative Office Dataset)

Disposition (All Cases)	**1990**	**1991**	**1992**	**1993**	**1994**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**	**Total**
Voluntary Dismissal	10.07%	10.92%	11.75%	11.80%	11.86%	11.56%	11.14%	12.10%	11.12%	4.27%	12.13%	10.81%
Other Dismissal	16.88%	20.11%	18.08%	20.23%	21.90%	23.51%	25.31%	24.09%	27.27%	25.63%	21.60%	22.62%
Total	**26.95%**	**31.03%**	**29.83%**	**32.03%**	**33.76%**	**35.07%**	**36.45%**	**36.19%**	**38.39%**	**29.90%**	**33.73%**	**33.42%**

More importantly, however, when one compares the *Conley*-reversed cases based on specific case type, it becomes more evident that the consequence of applying an *Iqbal*/*Twombly* pleading rule will have a larger-than-considered effect on meritorious cases. For instance, prisoners' rights cases in the studied cohort achieved success about 22% of the time.[129] When looking specifically at cases with the Administrative Office Code 550, success was achieved in almost 24% of cohort cases, although the sample is admittedly small.[130] This is significantly higher than the 7% success rate achieved in prison cases overall,[131] although, again, much depends on whether voluntary and other dismissals may be counted as successes.[132] If these last two disposition categories are considered successful, then the success rate for prison cases in the cohort jumps to almost 52%.[133] Similarly, when one compares the success of non-prisoner civil rights claims in the cohort studied here, best represented by Administrative Office Code 440, the rate of success in this cohort is either slightly higher or lower than the overall rate, depending on how the questionable cases fall.[134] The same is true of employment discrimination cases (best represented by Administrative Office Code 442), in which the *Conley*-reversed cases achieve as high a rate of success as the Administrative Office Code 442 cases even under the most expansive definition of success. One sees the same pattern in contract and antitrust cases as well.

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129. *See supra* Table 5.

130. *See supra* Table 6.

131. *See infra* Table 11b.

132. Eisenberg and Schlanger have reported that, with respect to prisoner cases, the Administrative Office coding of plaintiff judgments is generally accurate, with some marginal exceptions. Eisenberg & Schlanger, *supra* note 105.

133. The Administrative Office data for code 550 cases is perhaps the best example of why one must be skeptical of the claim that all "other" dismissals should be considered successful dispositions for prisoner-plaintiffs. As Tables 11b and 11c demonstrate, in every case category other than prisoner cases, the settlement rate is always significantly higher than the "other" dismissal rate. In prisoner cases, however, the rate for "other" dismissals is more than five times the settlement rate. It is hard to imagine an explanation as to why successful prisoner cases, as opposed to all other cases, would be more likely to be resolved through "other" dismissals than through settlement. In addition, no other researcher has reported success rates approaching 50% in prisoner cases. *See, e.g.*, Schlanger, *supra* note 93, at 1557–58.

134. *Compare supra* Table 6 *with infra* Table 11b.

Table 11a. Disposition by Administrative Office Code, Unsuccessful Claims (Administrative Office Data)

Disposition	**190 (Contract)**	**360 (Pers Inj)**	**410 (Antitrust)**	**440 (Civ Right)**	**442 (Emp Disc)**	**443 (Accom)**	**470 (RICO)**	**550 (Prison)**	**890 (Stat)**
Dismissal, Failure to Prosecute	2.36%	2.42%	1.30%	4.71%	3.79%	3.62%	3.67%	9.20%	2.83%
Dismissal, Lack of Jurisdiction	1.99%	2.48%	1.57%	3.26%	1.14%	1.83%	3.10%	2.41%	2.35%
Judgment, Motion Before Trial, Defendant	5.77%	9.55%	14.03%	19.02%	17.02%	8.93%	15.00%	26.02%	9.40%
Judgment, Motion Before Trial, Other	0.41%	0.24%	0.60%	0.39%	0.31%	0.31%	0.73%	0.20%	0.60%
Jury Verdict, Defendant	0.60%	3.19%	1.38%	2.65%	2.10%	1.37%	0.78%	1.03%	0.28%
Jury Verdict, Other	0.14%	0.14%	0.08%	0.17%	0.12%	0.16%	0.10%	0.03%	0.03%
Directed Verdict, Defendant	0.08%	0.27%	0.16%	0.23%	0.29%	0.16%	0.04%	0.15%	0.04%
Directed Verdict, Other	0.00%	0.00%	0.00%	0.00%	0.01%	0.01%	0.01%	0.00%	0.00%
Court Verdict, Defendant	0.55%	0.90%	0.64%	0.72%	1.53%	0.75%	0.23%	1.39%	0.51%
Court Verdict, Other	0.13%	0.05%	0.08%	0.06%	0.05%	0.14%	0.11%	0.05%	0.07%
Judgment on Other Grounds, Defendant	0.73%	1.03%	1.61%	3.30%	1.63%	1.68%	1.87%	6.02%	1.42%
Judgment on Other Grounds, Other	0.80%	0.81%	1.77%	1.28%	1.05%	1.13%	1.12%	1.65%	1.25%
Total	**13.57%**	**21.08%**	**23.22%**	**35.79%**	**29.04%**	**20.09%**	**26.76%**	**48.15%**	**18.78%**

Table 11b. Distribution by Administrative Office Code, Successful Claims (Administrative Office Data)

Disposition	**190 (Contract)**	**360 (Pers Inj)**	**410 (Antitrust)**	**440 (Civ Right)**	**442 (Emp Disc)**	**443 (Accom)**	**470 (RICO)**	**550 (Prison)**	**890 (Stat)**
Default Judgment	8.07%	0.38%	0.48%	0.30%	0.33%	0.65%	2.76%	0.22%	4.48%
Consent Judgment	3.19%	1.14%	5.52%	1.10%	1.21%	7.29%	1.70%	0.14%	3.77%
Judgment, Motion Before Trial, Plaintiff	3.85%	0.69%	2.05%	1.01%	0.46%	1.05%	2.40%	0.33%	4.51%
Jury Verdict, Plaintiff	1.03%	2.40%	1.57%	1.09%	1.46%	1.17%	1.17%	0.12%	0.30%
Directed Verdict, Plaintiff	0.08%	0.04%	0.04%	0.02%	0.02%	0.07%	0.04%	0.00%	0.03%
Court Verdict, Plaintiff	0.93%	0.72%	0.26%	0.31%	0.40%	0.86%	0.38%	0.14%	0.51%
Judgment on Other Grounds, Plaintiff	1.29%	0.36%	0.70%	0.40%	0.28%	0.61%	1.01%	0.11%	1.60%
Settlement	38.73%	45.32%	35.33%	29.01%	39.21%	40.19%	29.52%	6.16%	28.86%
Total	**57.17%**	**51.05%**	**45.95%**	**33.24%**	**43.37%**	**51.89%**	**38.98%**	**7.22%**	**44.06%**

Table 11c. Distribution by Administrative Office Code, Questionable Claims (Administrative Office Data)

Disposition	**190 (Contract)**	**360 (Pers Inj)**	**410 (Antitrust)**	**440 (Civ Right)**	**442 (Emp Disc)**	**443 (Accom)**	**470 (RICO)**	**550 (Prison)**	**890 (Stat)**
Voluntary Dismissal	15.34%	11.81%	14.03%	10.13%	12.80%	12.71%	13.12%	6.57%	16.37%
Other Dismissal	13.93%	16.07%	16.80%	20.83%	14.80%	15.31%	21.15%	38.04%	20.78%
Total	29.27%	27.88%	30.83%	30.96%	27.60%	28.02%	34.27%	44.61%	37.15%

In addition to the figures generated from the Administrative Office data, there are more specific rates of success reported for particular areas of litigation. For prisoner cases, estimates of success have ranged between 15% and 18%.[135] In civil cases that involve neither prisoners nor constitutional claims, rates of success have been reported at much higher levels, between 65% and 85%.[136] Constitutional tort cases not involving prisoners have achieved success rates approaching 50%, and employment discrimination cases have had success rates ranging between 55% and 80%.[137] Each of these different sources is summarized in Table 12, including the cohort data reported here and the data from the Administrative Office.

Table 12 reveals the large degree of similarity between the rates of success reported here and the rates of success reported by other researchers and contained within the Administrative Office data. Thus, although the overall rate of success of the cohort studied here may be on the low side of the average success rate of all cases combined in the Administrative Office database, it is likely explained by the fact that civil rights and prisoners' rights cases are overrepresented in the sample, and these types of cases are generally less successful than contract and tort cases.[138]

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135. Schlanger, *supra* note 93, at 1558; Schwab & Eisenberg, *supra* note 76, at 732–33 & tbl.IV; *see also* Eisenberg & Schwab, *supra* note 123, at 682. Schlanger included judgment for the plaintiff, settlement, or voluntary dismissal as a metric for success. Schlanger, *supra* note 93, at 1594–96. In prisoner cases, 6% to 7% were settled before trial, 1% received a judgment after trial, and 6% to 8% voluntarily dismissed their claims. *Id.* at 1597. Schwab and Eisenberg gathered data from three separate judicial districts for cases filed from 1980 to 1981, and success included settlement, judgment, stipulated dismissal, or voluntary dismissal. Schwab & Eisenberg, *supra* note 76, at 726–27.

136. *See* Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 122 (2009) (reviewing studies of tort litigation and antitrust claims reporting settlement rates of about 70% to 80% of filed cases); *id.* at 130 tbl.3 (providing data showing success rates ranging from 64% to 87% for tort claims and 65% to 73% for contract claims); Schwab & Eisenberg, *supra* note 76, at 732–33 & tbl.IV (reporting success rate of 84% for nonprisoner civil cases, excluding constitutional tort cases); *see also* Eisenberg & Schwab, *supra* note 123, at 682 (reporting that plaintiffs in contested non–civil rights cases succeeded in over 80% of all cases).

137. *See* Eisenberg & Lanvers, *supra* note 136, at 130 tbl.3 (providing data showing success rates ranging from 27% to 45% for constitutional tort claims and 55% to 82% for employment discrimination); Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 188 (2010) (based on review of randomly selected cases, reporting success by settlement or judgment of 60% for employment discrimination cases); Schwab & Eisenberg, *supra* note 76, at 732–33 tbl.IV (reporting a success rate of 50% for nonprisoner constitutional tort cases, defined to include cases coded as 440, 441, 442, 443, and 444).

138. *See infra* Appendix Table 4 (showing the distribution within the Administrative Office dataset of certain case codes among cases terminated between 1990 and 2000). Of principal interest is the following: 6.8% of the terminated cases were civil rights cases (code 440); 13% were prison cases (code 550); 5.2% were antitrust (code 410); 7.6% were employment discrimination cases (code 442); 7.6% were contract cases (code 190); 3.5% were tort cases (code 360); and 3.7% were RICO cases (code 470). When one compares these figures to the cohort, the cohort had fewer contract cases (5.1%), more prison cases (15.3%), civil rights cases (24.1%), employment discrimination cases (9.5%), and tort cases

This should not be surprising, as the cases that are most vulnerable to dismissal for having thin pleadings are ones that rely on state of mind allegations, which are the heart of most civil rights and private discrimination claims.[139] Indeed, if the detail of pleadings is more a reflection of information availability than merit, cases in which state of mind plays a large role or in which there are large information asymmetries, such as civil rights, constitutional, and employment discrimination cases, are most likely to be vulnerable to accusations of thin pleading.

(5.8%), and about the same number of antitrust (5.1%) and RICO cases (3.6%). *See supra* Table 6. The starkest difference is in the frequency of civil rights cases (24.1% in the cohort to 6.8% in the Administrative Office group), but even a marginal increase in prisoner cases will drive success numbers down.

139. In an analogous context, researchers have found that non-nuisance securities litigation claims in which hard evidence of fraud was lacking were less likely to be filed after passage of the PSLRA, suggesting that the heightened pleading standard created by that statute deterred filing of meritorious suits where evidence of wrongdoing was more difficult for plaintiffs to acquire. *See* Stephen J. Choi, Karen K. Nelson & A.C. Pritchard, *The Screening Effect of the Private Securities Litigation Reform Act*, 6 J. EMPIRICAL LEGAL STUD. 35, 37 (2009).

Table 12. Case-Type Specific Settlement/Success

	Schlanger	**Schwab & Eisenberg**[140]	**Eisenberg & Lanvers**	**Eisenberg & Lanvers**	**Nielsen, et al.**	**AO Data**	**Reinert, 2010**
Cohort Studied	All Cases	3 Districts	EDPA	NDGA	7 Districts	All Cases	Cohort
Years Studied	1990–1995	1980–1981	2001–2002	2001–2002	1998–2003	1990–2000	1990–1999
Success Definition	Judgment Settlement Vol. Dism.	Judgment Settlement Vol. Dism. Stip. Dism.	Settlement, Default Judg. Consent Judg. Stat. Closing Vol. Dism. Other Dism.	Settlement, Default Judg. Consent Judg. Stat. Closing Vol. Dism. Other Dism.	Settlement	Varied	Judgment Settlement
Prison	14.9%[141]	18%				7%–51%	22%
Employment Discrimination		50%	82.4%	55.5%	60%	43%–70%	66.7%
Civil Rights/ Constitutional Tort		50%	45%	27.3%		33%–63%[142]	48.6%
Contract			65.3%	72.5%		57%–86%	85.7%
Tort			87.2%	63.8%		51%–79%	46.2%

140. Schwab & Eisenberg categorized employment discrimination and other civil rights cases as "non-prisoner civil rights cases" together. Schwab & Eisenberg, *supra* note 76, at 732–33. The breakdown of outcomes was as follows: in prisoner cases, 1% of the filed cases were resolved at trial for the plaintiff and 17% were resolved through settlement or other means; in other civil rights cases, 5% were resolved at trial and 45% were resolved through settlement and the like. *Id*. at 729.

141. According to Schlanger, 6.9% of prisoner cases were subject to voluntary dismissal, 6.7% were settled, 0.3% were litigated to trial favorably, and 0.9% were terminated in the plaintiff's favor in some other way. Schlanger, *supra* note 93, at 1594 tbl.II.A.

142. Code 440.

IV. RAMIFICATIONS

The goal of this research project was to incorporate empirical data into the debate over the value of pleading rules as screening devices. If we take the controversy regarding the rules of pleading to revolve around the central question of how best to filter out meritless claims without sacrificing meritorious claims, the data collected from the cohort studied here (most notably, Tables 4, 5, 9, and 12) provide good grounds to question the wisdom of the change in pleading adopted by the Court in *Iqbal* and *Twombly*. This is so for several related reasons, best explored by focusing first on the cohort data taken on its own and then by comparing the cohort data to the cases reflected in the Administrative Office database.

A. Likely Effect of Iqbal *as Indicated by Cohort Success Rates*

First, as the data in Table 4 reflect, under traditional definitions of "success," the rules of *Iqbal* and *Twombly* pose the potential to eliminate cases that have better than a 50% chance of being successful. In other words, had the cohort cases been litigated in a post-*Iqbal* era rather than in the *Conley* era, the application of plausibility pleading standards would have screened out mostly meritorious cases, not meritless ones. This is, of course, a contestable proposition; perhaps some of the appellate courts that reversed dismissals in the *Conley* era also would make the same judgment in a heightened pleading context. But it is worth recognizing that, of the appellate cases that cited *Conley* between 1990 and 1999, only 41% of dismissals by the district court that were then appealed were actually reversed.[143] Thus, appellate courts were quite willing to affirm dismissals even in the liberal notice pleading era; under a plausibility pleading standard, the cases that were permitted to proceed in the cohort would have a much lower chance of proceeding now. And more to the point, there is no reason to think that courts will be skillful in determining which potentially dismissible case is most likely to be shown to be meritorious. In other words, to the extent that advocates for heightened pleading continue to maintain that it is an effective tool at filtering for merit, this paper suggests that some empirical evidence should be presented to support that contention.[144] The absolute measures of success reported here reinforce data that have previously been reported in the securities litigation arena[145] and should undermine the broad assumption that thinly pleaded cases are often meritless or, worse, frivolous.

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143. *See supra* Tables 1, 2.

144. For instance, one would expect that, in a heightened pleading world, cases that survive motions to dismiss should be more likely to be successful than cases that survive motions to dismiss in a notice pleading world. Some of this data may be obtainable now that statutes like the PSLRA have been in effect for some time, but the initial empirical word on the PSLRA suggests quite the opposite. *See* Choi, *supra* note 22, at 623 (suggesting that rather than selectively deterring frivolous lawsuits, the PSLRA disproportionately discouraged meritorious ones).

145. *See* Choi et al., *supra* note 139, at 64–65.

It is, of course, true that relying on settlement as an indicator of merit has its limitations, although most empirical studies to date have used even broader measures of success, including voluntary dismissals and dismissals for failure to prosecute.[146] After all, the Court explicitly justified its adoption of the *Twombly* rule based on its perception of the undue settlement pressures created by the high cost of discovery in antitrust litigation.[147] And despite the dearth of empirical evidence supporting this assertion, there is at least an economically rational explanation for parties to settle cases of questionable merit rather than litigate to judgment.[148] Settlement rates can also reflect strategic considerations.[149] But characteristics of the cohort studied here suggest that settlement is less likely to reflect economic and strategic decisions to settle for nuisance value.[150] It should be

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146. *See supra* note 76 and accompanying text (indicating that studies have included judgments, settlements, voluntary dismissals, and dismissals for failure to prosecute as indicative of success). In this study, voluntary dismissals have been omitted from consideration unless success or failure could be independently confirmed, and dismissals for failure to prosecute have been coded as unsuccessful.

147. Needless to say, there is no empirical evidence demonstrating that high discovery costs in complex litigation operate as a greater inducement to settle than perception of the merits of the case. Indeed, a recent survey of the plaintiff and defense bars indicates that attorneys consider discovery costs to almost routinely fall below 3.5% of their client's stake in the litigation, and the attorneys generally agree that discovery costs are lower than expected. *See* Emery G. Lee III & Thomas E. Willging, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY 43 (Oct. 2009), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf.

148. *See, e.g.*, Peter H. Huang, *Lawsuit Abandonment Options in Possibly Frivolous Litigation Games*, 23 REV. LITIG. 47 (2004). *But see* Patrick J. Borchers, *Jurisdictional Pragmatism:* International Shoe*'s Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561, 585 n.154 (1995) (noting that repeat players will hesitate to settle even when it is economically rational to do so because of fear that settlement will induce frivolous litigation by others); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986) (criticizing economic theory that concludes there is excessive incentive to litigate meritless cases).

149. Repeat players may settle cases that appear particularly meritorious so as to avoid the development of unfavorable law, and plaintiffs' counsel may have the opposite motivation. Moreover, plaintiffs' counsel may bring cases they know will lose so as to develop the law or to develop discovery for the next set of cases. All of these factors may influence settlement rates so as to create risks in interpreting the rates as indicators of success.

150. By "nuisance value," I mean a settlement that reflects economic considerations about the cost of litigation rather than any judgment about likely merit. As explained below, a significant portion of the settlements recorded here were in cases in which government entities were defendants. For a variety of reasons, government entities may be less likely to agree to a settlement as an economically motivated alternative to litigation. *See* Dawson v. United States, 68 F.3d 886, 897–98 (5th Cir. 1995) (reversing district court's sanction of a government attorney who refused to make a settlement offer to a pro se prisoner because of the government's fear that settling prisoner claims will encourage other suits); Borchers, *supra* note 148, at 585 n.154; Daniel Marcus & Jeffrey M. Senger, *ADR and the Federal Government: Not Such Strange Bedfellows After All*, 66 MO. L. REV. 709, 712 (2001)

remembered that each of the cases studied here involved situations in which a motion to dismiss was litigated, appealed, and then remanded to the district court. If a defendant is inclined to pay a nuisance settlement because of economic considerations or for strategic reasons, that defendant may be less likely to incur the considerable expense of moving to dismiss and defending an appeal.[151] Of course, it takes both parties to settle, and it is possible that a plaintiff will be more likely to settle for nuisance value after having lost a motion to dismiss, or that during the time that it has taken for the dismissal to be adjudicated the plaintiff may perceive her injury as being less painful.[152] But this same plaintiff would be unlikely to be motivated to accept a nuisance settlement immediately after remand from an appellate court decision that reversed an adverse decision by the trial court. Thus, at the time immediately after remand, there is a reduced likelihood that a settlement will reflect nuisance motivations; even if the defendant were then inclined to offer a nuisance settlement, it is unlikely that a plaintiff would be willing to accept it, having already successfully appealed one adverse decision. In any event, most of the cases did not settle immediately on remand; instead, almost 75% of the time the parties engaged in some quantum of discovery before resolving the case through motions or settlement.[153] Most of the settlements or stipulated dismissals took place after discovery.[154] Thus, the pattern of litigation observed in these cases undermines the contention that they are nuisance settlements.[155]

(explaining that some cases are harder for the government to settle if a lawsuit challenges "the lawfulness of government action" or if there is a risk of "copycat litigation"). *But see* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 618 (2001) (Scalia, J., concurring) (referring to plaintiffs seeking attorneys' fees from government entities as "extortionist"); David S. Mendel, Note, *Determining Ripeness of Substantive Due Process Claims Brought by Landowners Against Local Governments*, 95 MICH. L. REV. 492, 494–95 & n.9 (1996) (discussing claim that municipalities sometimes are pressured to settle landowners' suits because of potential costs of litigation).

151. Presumably, the incentive to offer a nuisance settlement changes as a case proceeds from one procedural stage to the next. With each progression, the defendant's expectation of success and future litigation costs changes, but not always in predictable ways. Prior to moving to dismiss, however, the defendant may predict that future litigation costs could be high, and therefore may consider it an opportune time to negotiate a quick and inexpensive settlement.

152. *See* John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 COLUM. L. REV. 1516, 1536–40 (2008) (arguing that a plaintiff "adapt[s] hedonically to her injury" over time and will adjust her settlement demands accordingly).

153. *See infra* Appendix Table 5.

154. Of the eighty-seven cases in which there was some discovery after the case was remanded to district court from the appellate court, thirty-six were successful via settlement or stipulated dismissal, and five were successful in other ways. Of the thirty-one cases in which it could be determined that there was no discovery, twenty-one were resolved via settlement. Thus, most settlements occurred after discovery.

155. Another way to test nuisance settlements is by looking at the value of the settlement. Because the settlement amount was not reported in the overwhelming majority of these cases, and because counsel have indicated in follow-up correspondence that the settlement amount of some cases is confidential, it is near to impossible to use this rubric for estimating success. There is evidence, however, that in the area of securities litigation, the advent of the PSLRA decreased the likelihood that a subset of meritorious non-nuisance cases would be

It is also striking that a large percentage of the cases in the cohort involve government defendants, as one might expect with such a high percentage of civil rights and prisoners' rights cases. Additionally, in some cases the settlements were reflected in consent decrees, which is more suggestive of ultimate merit than an average private settlement.[156] Many observers view government defendants as irrational with respect to settlement. In part this is because most government defendants do not incur legal costs commensurate with the litigation activity in which they engage.[157] And in part this is because they are repeat players and view settlement as sending a signal of weakness to other potential rent-seeking plaintiffs.[158] Finally, some commentators simply think government entities are irrational.[159]

For those who view settlement with irrefutable skepticism, there may be little to commend this study. Then again, it may be impossible to convince such individuals that there is anything redeeming about our current civil justice system, regardless of the pleading standard, given the central role occupied by pre-trial dispositions. Nonetheless, even for those who believe that settlements are completely irrelevant to underlying merit, these data provide other reasons to reconsider longstanding assumptions about pleading. If one examines only the cases that litigated to judgment, for instance, three resulted in verdicts for the plaintiff. In addition, three other cases resulted in judgments for the plaintiff—one via a stipulated judgment and two via an offer of judgment. Of the eleven cases in which judgment was entered for the defendant after litigation, one involved a case in which the jury awarded a significant verdict for the plaintiff, but the district judge granted a judgment notwithstanding the verdict. Thus, even only considering cases that were litigated to judgment, plaintiffs obtained success in a substantial percentage, slightly more than one-third. Win rates at trial for all categories of cases have hovered around 40% for the time period in question, although for specific categories of cases, like employment discrimination cases, the win rate has increased steadily, from about 27% in 1990 to 37% by 2000.[160]

The fact that plaintiffs are not as successful as or more successful than defendants at trial is not necessarily an indication of weak cases. Because the most difficult cases, in one direction or the other, are the cases most likely to litigate to judgment, "the win rate [at trial] reveals something about the set of adjudged cases,

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filed. *See* Choi et al., *supra* note 139, at 64–65.

156. The distinction between private settlements and court-enforced consent decrees was recognized by the Supreme Court itself in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 605 (2001), which considered the latter, but not the former, to justify the award of attorneys' fees to a plaintiff as a "prevailing party" under 42 U.S.C. § 1988.

157. *See, e.g.*, Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1032–33 & nn.43–44 (2010) (summarizing literature regarding indemnification of law enforcement defendants).

158. *See, e.g.*, Schlanger, *supra* note 93, at 1619 (describing "no settlement" policies in some prison systems).

159. *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 370–71 (2000).

160. Clermont & Schwab, *supra* note 29, at 441 fig.7.

a universe dominated by close cases—but reveals little about the underlying, variegated mass of disputes and cases."[161] Clermont and Eisenberg have discussed several factors that might lead to win rates that depart from an even fifty-fifty split: different stakes between the parties, because of noneconomic or repeat player factors; misperception of the biases of the adjudicating body, in which case a below-50% win rate may reflect that the decision maker is not as plaintiff friendly as the parties predict; and the average strength of the cases, which they suggest will decrease as settlement and other disposition methods weed out the strongest cases.[162] In addition, the fact that the plaintiff bears the burden of proof, even if by only a preponderance, could explain a below-50% success rate at trial.

These observations all relate to the data considered standing on their own, and not in comparison with measures of success observed in other datasets or reported by other researchers. Even some of the most experienced empiricists have emphasized that achieving an estimate of case outcomes that reflects "real" wins and losses can be difficult: counting "formal" wins and losses may be misleading because some formal losses may actually have achieved something worthwhile for the plaintiff, and some formal wins may have been insufficient to justify the high costs of litigation.[163] By calculating and comparing such formal win and loss rates over time, however, research can at least illuminate relative success.[164] Thus, the comparisons between the cohort and the Administrative Office data, as well as the data produced by other researchers, help provide a comparative success rate for the cohort that also undermines an apparent assumption upon which the *Iqbal* and *Twombly* rules rest. This comparative approach avoids resolving the difficult question of exactly how much weight to place on settlement versus formal judgment in terms of its relation to the merits of a case.

B. Likely Effect of Iqbal *as Indicated by Comparisons Between Cohort and Administrative Office Data*

When one turns to comparisons between the rates of success in the cohort cases and rates of success reported elsewhere and observed in the Administrative Office data, these thinly pleaded cases seem to do at least as well as the generality of cases. As Table 12 shows, the cohort cases occupy a middle ground, somewhere in the range of success reported in other datasets, depending on how one measures success. If success were measured only by settlements and verdicts, the cohort cases seem to have a higher degree of success than that reported in many other datasets. One can only interpret this finding so far, especially with respect to the data contained in the Administrative Office dataset. As Gillian Hadfield has shown by conducting a detailed audit of the Administrative Office data, settlements can be hidden in voluntary and other dismissals.[165] This finding of Hadfield's can be

161. Clermont & Eisenberg, *supra* note 99, at 138.

162. *Id.* at 138–40.

163. *Id.* at 128.

164. *See id.* (observing that despite the limitations of relying on formal outcomes, when averaged and observed over several years, such measures can "tell the researcher quite a bit").

165. Hadfield, *Civil Litigation*, *supra* note 96, at 1309–11 & tbls. 9 & 11 (showing that

confirmed by the thinly pleaded cohort: a number of cases that I determined to be settlements by looking at the actual docket were coded by the Administrative Office as voluntary or other dismissals.[166] Thus, even if one limited the Administrative Office data to only settlements and verdicts, the success rate is probably larger than is reported simply according to the Administrative Office's coding.

In any event, this evidence is only compelling if it is related to a relevant assumption. For those who believe that the vast majority of the cases that will be dismissed under a heightened pleading scheme like that imposed by *Iqbal* and *Twombly* are meritless or frivolous, the data reported here seem to contradict that assertion. For those who believe that *Iqbal* and *Twombly* are simply better at screening out meritless cases than notice pleading, these data are cause for questioning. And for those who are willing to sacrifice a number of good cases in order to reduce docket levels to something manageable for federal courts, the data reported here at least provide some basis upon which to have the debate. That is, if we are focused on docket management more than ensuring that meritorious actions have an opportunity to blossom through litigation, we can at least debate how best to reduce the docket and whether prematurely dismissing a high percentage of cases that most people agree are important—civil rights and other public law cases—is a satisfactory price to be paid. After all, if heightened pleading is no better a filter for merit than randomly dismissing cases at the outset, then it is worth considering other alternatives.[167]

C. Methodological Objections and Responses

It is worth discussing some of the methodological concerns that might be raised about this study. First, one must address the potential for selection bias that is present in this study at many levels. Obviously, the source of cases is one potential cause of selection bias because I started with (1) appellate cases (2) between 1990 and 1999 that (3) relied on *Conley* to reverse district court decisions. The reason I began with appellate cases has been explained above: in my view, it is a good, though not ideal, way of getting at the cases that are most likely to be viewed marginally sufficient by a judge who is interpreting *Iqbal* and *Twombly* broadly. Because appellate reversals reflect instances of disagreement between the district court (and perhaps a magistrate) and at least two appellate judges as to the sufficiency of a complaint under notice pleading standards, these cases are most likely to be vulnerable to dismissal under heightened pleading standards.

The period of study is subject to some concern; after all, many sage observers have noted that even during this period of time some courts did not take *Conley*

25% of "other" dismissals were settlements and 53% of voluntary dismissals were settlements).

166. Out of twenty-one cases that I recorded as a stipulated dismissal, I could determine the way that the Administrative Office coded them in sixteen cases. Of those sixteen, three were coded as voluntary dismissals, five were coded as "other" dismissals, six were coded as settlements, and one was coded as a judgment (for the defendant!).

167. *See, e.g.*, David Rosenberg & Steven Shavell, *A Simple Proposal to Halve Litigation Costs*, 91 VA. L. REV. 1721, 1721 (2005).

seriously, at least for some kinds of cases.[168] But at least for this cohort, the appellate courts stuck to the liberal reading of *Conley* for all kinds of cases.[169] Indeed, if courts were routinely applying heightened pleading standards pre-*Iqbal* and *Twombly*, and if more detailed pleading were correlated with more meritorious suits, then one would expect the success rates observed in the Administrative Office data to be even higher. The Administrative Office data do not support such an effect, although it is not clear that the data are coded with sufficient subtlety to detect it.[170]

There could be a different problem with looking at the 1990 to 1999 time frame: if the substantive legal regime changed in a significant way during this period, it might affect success rates. One might imagine this to be the case in the cohort. Substantive law certainly changed over the period of study: Title VII was amended in 1991,[171] the Private Securities Litigation Reform Act was passed in 1995,[172] and the Prison Litigation Reform Act was passed in 1996.[173] And pleading law did not formally change, but in 1993 the Supreme Court felt compelled to remind lower courts of their obligations under *Conley*.[174] But after conducting multiple regression studies, time (as represented by year of termination[175]) does not appear to be a factor that exerts a significant influence on the outcomes of these cases.[176]

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168. *See, e.g.*, Fairman, *supra* note 21, at 998–1011.

169. That is, one can feel fairly confident that the cases contained in the cohort were not subjected to a heightened pleading standard because in every case dismissal was reversed based upon reliance on *Conley*'s liberal standard.

170. In part, this is because the Administrative Office does not distinguish between pleading dismissals and summary judgment dismissals. One would imagine that in a heightened pleading world, pleading dismissals would be relatively higher than in a notice pleading world, but the Administrative Office data do not admit that kind of analysis.

171. Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 412 (codified as amended in scattered sections of 42 U.S.C.).

172. Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

173. Prison Litigation Reform Act of 1995, Title VIII of Pub. L. 104-134, 110 Stat. 1321-66 (codified as amended in scattered sections of 18 U.S.C.).

174. *See* Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993).

175. Year of termination would appear to be a better indicator of time than year of filing. After all, when parties or courts resolve cases, they are usually doing so with respect to the current legal regime, or else because they are making a prediction about future legal changes. Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 411 (2007) (describing the effect of shifting Supreme Court policy on decisions to settle or litigate cases).

176. Because of the small sample size when one divides the cases according to year of termination, the study did not have tremendous power to detect statistically significant differences. Nonetheless, I used the "logit" command in Stata to run multiple regressions using the following independent variables: pro se status in the district court, case type (descriptive), and time (using two different ways of measuring the time at which the case was terminated). Success was the dependent variable. Regression analyses are on file with the author, and all significance testing was conducted at the 0.10 level. Pro se status was significantly negatively correlated with success for all case types, without regard to time of termination. Only four time variables were significantly correlated with success: termination

A different kind of selection bias could be present because of starting with appellate cases. Presumably, there is a difference between plaintiffs who appeal the dismissal of their complaint and plaintiffs who walk away without appeal. The former group may be more motivated, which may correlate with success later on in the case, at least as it is measured here. They may also have access to greater resources. Defendants may be influenced by a particularly strong appellate opinion that they will be unlikely to prevail at a later summary judgment stage. On the other hand, the defendant clearly had sufficient resources and motivation in the cohort cases to pursue and succeed in bringing a motion to dismiss, and the trial court at least initially thought the cohort cases to be weak. That attitude may persist on remand and influence the resolution of other motion practice. Moreover, a focus on appealed cases may better distinguish between those thinly pleaded cases which could not have been amended and those cases in which the pleadings were thin for strategic reasons. One would expect that a plaintiff who could plead with more specificity would choose to amend rather than go through a lengthy and costly appellate process to reverse a lower court's dismissal.

Some of these are difficult objections to take account of. Looking to prisoner cases may go some way to offering assurances that the plaintiffs who appeal are not sufficiently different from the acquiescing plaintiffs in outcome-determinative ways. At least it can be said that the prisoner-plaintiffs who appeal are unlikely to have greater material resources than the prisoner-plaintiffs who do not. They may be more motivated, but prisoner litigation, with the great resistance to settling from prison officials,[177] may be one set of cases where the plaintiff's level of motivation is mostly irrelevant to the outcome of a case. Moreover, Kevin Clermont has provided data that suggest that, in fact, there is very little selection effect observed among those losing parties who choose to appeal and those who do not.[178] Finally, it should be remembered that such a small percentage of disputes are litigated in general that it is likely that a plaintiff who files suit is already highly motivated to proceed.[179]

There is another kind of selection bias at work here as well, which is that the cases considered in the cohort have arguably advanced past a particular procedural stage—the motion to dismiss—such that the success rate reported in the cohort is already biased toward positive success rates. The validity of this objection depends in large part on two other factors: (1) the percentage of cases dismissed at the pleading stage in run of the mill cases, and (2) the percentages of cases settled before issue is joined. Although the Administrative Office data cannot give us these

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during the years 1994 and 2000, and termination after the years 1996 and 1997. The association between those time variables and success was positive in every case, except for termination during the year 1994, which was negatively correlated with success. Even after controlling for circuit of origin, terminations after the years 1996 and 1997 were still significant correlates, although origination of the case in the Seventh or Ninth Circuit also explained some of the variance. Similarly, termination during the years 1994 and 2000 remained a significant correlate of success for all circuits, although origination in the Seventh and Ninth Circuits was a significant confounder for termination in the year 2000. None of the time variables was as closely tied to success as pro se status in the district court.

177. *See supra* notes 157–59 and accompanying text.

178. Clermont, *supra* note 16, at 1971–72.

179. Trubek et al., *supra* note 98, at 86–87.

percentages with exact precision, a rough comparison suggests that more cases are terminated at an early stage by settlement than by dismissal.[180] Thus, this suggests that the effect of this selection bias is negligible, or even, in fact, should lead us to reduce our estimates of success in the control group as compared to the cohort.

CONCLUSION

All empirical data should be interpreted with caution. The data reported here are no exception. Litigation is extremely complex, and any attempt to quantify outcomes carries with it inherent risks, many of which have been discussed in this paper. But at the very least, these data suggest avenues for further research. We would benefit by having more inclusive cohorts and more precise comparison groups. To the extent we can eliminate methodological flaws in case selection, we should strive to do so.

But whatever flaws there may be in the methodology used here, the data force us to confront the strength of different arguments for heightened pleading. In the absence of empirical data, it is insufficient to continue to rest on the assumption that heightened pleading can rid us of meritless cases without imposing any significant costs. Indeed, the data here suggest that the costs imposed by heightened pleading may be substantial and may not create the assumed benefits. In this sense, a heightened pleading standard may function in the same way that randomized dismissal would, amounting to a radical departure from pleading standards that few would find satisfactory.[181] Given the ongoing debate about pleading standards that is taking place within the judiciary, the legislature, and the academy, the data presented here must be taken into account as we move forward to resolve how wide the path to civil litigation should be.

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180. *See infra* Appendix Table 2.

181. *But see* Rosenberg & Shavell, *supra* note 167, at 1721 (proposing that, to address discovery costs and docket overload, courts randomly dismiss half of filed complaints seeking damages, but award double damages in cases that proceed).

APPENDIX

Appendix Table 1. Cohort of *Conley*-Reversed Pleading Cases

ID[182]	Case Name	Cite	Circuit	Year	District	Docket No.
3	Gibbs v. Norman	898 F.2d 153 (1995 WL 411829)	6th Cir.	1990	E.D. Mich.	89-70974
20	Yamaguchi v. U.S. Dep't of the Air Force	109 F.3d 1475	9th Cir.	1997	D. Haw.	94-766
22	Northington v. Jackson	973 F.2d 1518	10th Cir.	1992	D. Co.	91-352
24	*In re* Johannessen	76 F.3d 347	11th Cir.	1996	M.D. Fla.	94-1900
27	Atchinson v. District of Columbia	73 F.3d 418	D.C. Cir.	1996	D.D.C.	92-1862
31	Leatherman v. Tarrant Cnty. Narcotics Intelligence and Coordination Unit	507 U.S. 163	S. Ct.	1993	N.D. Tex.	89-842
46	Wyatt v. City of Boston	35 F.3d 13	1st Cir.	1994	D. Ma.	93-12412
68	Harris v. City of New York	186 F.3d 243	2d Cir.	1999	S.D.N.Y.	96-7565
76	George Haug Co. v. Rolls Royce Motor Cars, Inc.	148 F.3d 136	2d Cir.	1998	S.D.N.Y.	96-3140
77	Drake v. Delta Air Lines, Inc.	147 F.3d 169	2d Cir.	1998	E.D.N.Y.	94-5944
78	Rogers v. City of Troy, N.Y.	148 F.3d 52	2d Cir.	1998	N.D.N.Y.	94-1652
79	Chance v. Armstrong	143 F.3d 698	2d Cir.	1998	D. Conn.	95-2010
85	Northrop v. Hoffman of Simsbury, Inc.	134 F.3d 41	2d Cir.	1997	D. Conn.	96-97
87	Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.	128 F.3d 59	2d Cir.	1997	S.D.N.Y.	95-926
99	Bernheim v. Litt	79 F.3d 318	2d Cir.	1996	S.D.N.Y.	94-5378
101	Lyons v. Legal Aid Soc'y	68 F.3d 1512	2d Cir.	1995	S.D.N.Y.	94-2502
102	Gant v. Wallingford Bd. of Educ.	69 F.3d 669	2d Cir.	1995	D. Conn.	94-1365
106	Staron v. McDonald's Corp.	51 F.3d 353	2d Cir.	1995	D. Conn.	93-665
107	Simmons II v. Abruzzo	49 F.3d 83	2d Cir.	1995	S.D.N.Y.	92-7615
108	Glendora v. Cablevision Sys. Corp.	45 F.3d 36	2d Cir.	1995	S.D.N.Y.	93-8344
109	Yusuf v. Vassar Coll.	35 F.3d 709	2d Cir.	1994	S.D.N.Y.	92-5462
110	Wachtler v. Cnty. of Herkimer	35 F.3d 77	2d Cir.	1994	N.D.N.Y.	91-1328
114	Cohen v. Koenig	25 F.3d 1168	2d Cir.	1994	S.D.N.Y.	92-4463
116	Gagliardi v. Vill. of Pawling	18 F.3d 188	2d Cir.	1994	S.D.N.Y.	90-7047
118	Sheppard v. Beerman	18 F.3d 147	2d Cir.	1994	E.D.N.Y.	91-1349
122	Ferran v. Town of Nassau	11 F.3d 21	2d Cir.	1993	N.D.N.Y.	91-1080
123	*In re* Time Warner Inc. Sec. Litig.	9 F.3d 259	2d Cir.	1993	S.D.N.Y.	91-4081
128	*In re* Ames Dep't Stores Inc. Stock Litig.	991 F.2d 953	2d Cir.	1993	D. Conn.	90-27

182. This is a unique identifier associated with each case.

ID	Case Name	Cite	Circuit	Year	District	Docket No.
130	Dwares v. City of New York	985 F.2d 94	2d Cir.	1993	S.D.N.Y.	90-4435
133	Weiss v. Wittcoff	966 F.2d 109	2d Cir.	1992	S.D.N.Y.	91-1057
134	Platsky v. CIA	953 F.2d 26	2d Cir.	1991	E.D.N.Y.	90-1915
135	Santana v. Keane	949 F.2d 584	2d Cir.	1991	S.D.N.Y.	90-6309
139	Allen v. WestPoint-Pepperell, Inc.	945 F.2d 40	2d Cir.	1991	S.D.N.Y.	90-3841
140	Ricciuti v. N.Y.C. Transit Auth.	941 F.2d 119	2d Cir.	1991	S.D.N.Y.	90-2823
148	Day v. Morgenthau	909 F.2d 75	2d Cir.	1990	S.D.N.Y.	88-8788
157	Menkowitz v. Pottstown Mem'l Med. Ctr.	154 F.3d 113	3d Cir.	1998	E.D. Pa.	97-2669
159	Foulk v. Donjon Marine Co.	144 F.3d 252	3d Cir.	1998	D.N.J.	95-323
161	Graves v. Lowery	117 F.3d 723	3d Cir.	1997	M.D. Pa.	95-1624
180	Comet Enter. Ltd. v. Air-A-Plane Corp.	128 F.3d 855	4th Cir.	1997	E.D. Va.	95-926
181	Garrett v. Elko	120 F.3d 261	4th Cir.	1997	W.D. Va.	95-494
182	Pilz v. FDIC	117 F.3d 1414	4th Cir.	1997	D. Md.	95-3808
191	Commercial Energies, Inc. v. United Airlines, Inc.	25 F.3d 1038	4th Cir.	1994	E.D. Va.	93-120
192	Jordan by Jordan v. Jackson	15 F.3d 333	4th Cir.	1994	E.D. Va.	93-66
194	Mylan Labs., Inc. v. Matkari	7 F.3d 1130	4th Cir.	1993	D. Md.	90-1096
196	Orga v. Williams	996 F.2d 1211	4th Cir.	1993	E.D. Va.	92-64
197	Robinson v. Ladd Furniture, Inc.	995 F.2d 1064	4th Cir.	1993	M.D.N.C.	92-273
200	Martin Marietta Corp. v. Int'l Telecomms. Satellite Org.	991 F.2d 94	4th Cir.	1992	D. Md.	90-1840
204	De Sole v. United States	947 F.2d 1169	4th Cir.	1991	D. Md.	89-1434
214	Shuff v. Avior Shipping Inc.	200 F.3d 814, 1999 WL 1093537	5th Cir.	1999	W.D. La.	98-1388
217	Jones v. Am. Council on Educ.	196 F.3d 1258, 1999 WL 800238	5th Cir.	1999	M.D. La.	98-592
221	Branton v. City of Dallas	166 F.3d 339, 1998 WL 912092	5th Cir.	1998	N.D. Tex.	97-245
242	Crowe v. Henry	43 F.3d 198	5th Cir.	1995	W.D. La.	92-365
260	*In re* Burzynski	989 F.2d 733	5th Cir.	1993	S.D. Tex.	90-2075
265	Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.	975 F.2d 1134	5th Cir.	1992	N.D. Tex.	88-2181
273	Garrett v. Commonwealth Mortg. Corp. of Am.	938 F.2d 591	5th Cir.	1991	S.D. Tex.	89-3006
276	Cooper v. Sheriff, Lubbock Cnty., Tex.	929 F.2d 1078	5th Cir.	1991	N.D. Tex.	90-16
288	Fitzpatrick v. City of Dearborn Heights	181 F.3d 100, 1999 WL 357756	6th Cir.	1999	E.D. Mich.	97-73020
290	Tolbert v. Ohio Dep't of Transp.	172 F.3d 934	6th Cir.	1999	N.D. Ohio	97-7592

ID	Case Name	Cite	Circuit	Year	District	Docket No.
299	Fisher v. Roberts	125 F.3d 974	6th Cir.	1997	E.D. Mich.	95-40475
307	Monette v. Elec. Data Sys. Corp.	90 F.3d 1173	6th Cir.	1996	E.D. Mich.	94-60351
318	Miller v. Currie	50 F.3d 373	6th Cir.	1995	N.D. Ohio	92-7456
326	King v. Schotten	28 F.3d 1213, 1994 WL 284538	6th Cir.	1994	N.D. Ohio	93-1249
339	Mayer v. Mylod	988 F.2d 635	6th Cir.	1993	E.D. Mich.	91-76512
355	Warren v. Soc'y Nat'l Bank	905 F.2d 975	6th Cir.	1990	N.D. Ohio	87-3451
363	Riley v. Daniels	894 F.2d 1336, 1990 WL 6961	6th Cir.	1990	E.D. Mich.	89-70518
368	Scott v. City of Chicago	195 F.3d 950	7th Cir.	1999	N.D. Ill.	98-3381
369	Smith v. Cash Store Mgmt., Inc.	195 F.3d 325	7th Cir.	1999	N.D. Ill.	99-1726
373	Bernstein v. Bd. of Educ.	191 F.3d 455, 1999 WL 594920	7th Cir.	1999	N.D. Ill.	97-6260
375	Payton v. Rush-Presbyterian-St. Luke's Med. Ctr.	184 F.3d 623	7th Cir.	1999	N.D. Ill.	97-5558
380	Glover v. Amoco Oil Co.	165 F.3d 32, 1998 WL 796083	7th Cir.	1998	N.D. Ill.	96-3018
381	Walker v. Wallace Auto Sales, Inc.	155 F.3d 927	7th Cir.	1998	N.D. Ill.	96-5506
385	Mack v. O'Leary	151 F.3d 1033, 1998 WL 416151	7th Cir.	1998	N.D. Ill.	94-621
392	Cook v. Winfrey	141 F.3d 322	7th Cir.	1998	N.D. Ill.	97-322
396	Duda v. Bd. of Educ.	133 F.3d 1054	7th Cir.	1998	N.D. Ill.	96-8481
404	Caremark, Inc. v. Coram Healthcare Corp.	113 F.3d 645	7th Cir.	1997	N.D. Ill.	95-5878
407	Lucien v. Peters	107 F.3d 873, 1997 WL 58812	7th Cir.	1997	S.D. Ill.	94-130
408	Sledd v. Lindsay	102 F.3d 282	7th Cir.	1996	N.D. Ill.	91-1917
413	Antonelli v. Sheahan	81 F.3d 1422	7th Cir.	1996	N.D. Ill.	93-3955
421	Emery v. Am. Gen. Fin., Inc.	71 F.3d 1343	7th Cir.	1995	N.D. Ill.	94-5181
429	Randolph v. McBride	67 F.3d 301, 1995 WL 578185	7th Cir.	1995	N.D. Ind.	94-767
432	Zarnes v. Rhodes	64 F.3d 285	7th Cir.	1995	C.D. Ill.	91-3344
433	MCM Partners, Inc. v. Andrews-Bartlett & Assocs., Inc.	62 F.3d 967	7th Cir.	1995	N.D. Ill.	92-5641
454	Sherwin Manor Nursing Ctr., Inc. v. McAuliffe	37 F.3d 1216	7th Cir.	1994	N.D. Ill.	92-6659

ID	Case Name	Cite	Circuit	Year	District	Docket No.
462	Jenkins v. Heintz	25 F.3d 536	7th Cir.	1994	N.D. Ill.	93-1332
469	Randle v. Bentsen	19 F.3d 371	7th Cir.	1994	N.D. Ill.	91-5757
471	Addams v. City of Chicago	19 F.3d 1436, 1994 WL 64332	7th Cir.	1994	N.D. Ill.	92-2893
474	Hi-Lite Prods. Co. v. Am. Home Prods. Corp.	11 F.3d 1402	7th Cir.	1993	N.D. Ill.	92-384
475	Casteel v. Pieschek	3 F.3d 1050	7th Cir.	1993	S.D. Ind.	87-1311
484	Mid Am. Title Co. v. Kirk	991 F.2d 417	7th Cir.	1993	N.D. Ill.	86-2853
486	Hrubec v. Nat'l R.R. Passenger Corp.	981 F.2d 962	7th Cir.	1992	N.D. Ill.	91-4447
499	Early v. Bankers Life and Cas. Co.	959 F.2d 75	7th Cir.	1992	N.D. Ill.	90-6711
500	McKoy v. Brennan	954 F.2d 726, 1992 WL 25364	7th Cir.	1992	W.D. Wis.	90-622
525	Hugh Chalmers Motors, Inc. v. Toyota Motor Sales	184 F.3d 761	8th Cir.	1999	E.D. Ark.	97-331
538	St. Cin v. Purkett	68 F.3d 479 (1995 WL 603366)	8th Cir.	1995	E.D. Mo.	94-673
539	Estate of Rosenberg v. Crandell	56 F.3d 35	8th Cir.	1995	D.S.D.	93-4131
546	Smith v. St. Bernard's Reg'l Med. Ctr.	19 F.3d 1254	8th Cir.	1994	E.D. Ark.	92-191
560	Murphy v. Lancaster	960 F.2d 746	8th Cir.	1992	W.D. Ark.	89-1141
564	Big Bear Lodging Ass'n v. Snow Summit, Inc.	182 F.3d 1096	9th Cir.	1999	C.D. Cal.	97-451
565	AlliedSignal, Inc. v. City of Phoenix	182 F.3d 692	9th Cir.	1999	D. Ariz.	96-683
570	Los Angeles Sheet Metal Workers' Joint Apprenticeship Training Comm. v. Walter	139 F.3d 906 (1998 WL 51720)	9th Cir.	1998	C.D. Cal.	96-3792
571	Enron Oil Trading & Transp. Co. v. Walbrook Ins.	132 F.3d 526	9th Cir.	1997	D. Mont.	90-122
574	Gilligan v. Jamco Dev. Corp.	108 F.3d 246	9th Cir.	1997	C.D. Cal.	94-4382
577	Moore v. Gerstein	107 F.3d 16 (1996 WL 726649)	9th Cir.	1996	N.D. Cal.	92-20152
582	Walleri v. Fed. Home Loan Bank of Seattle	83 F.3d 1575	9th Cir.	1996	D. Or.	90-855
583	Contreras v. United States	89 F.3d 844 (1996 WL 225768)	9th Cir.	1996	S.D. Cal.	93-1367
588	Jacobsen-Wayne v. Calvin C.M. Kam, M.D., Inc.	53 F.3d 338 (1995 WL 234909)	9th Cir.	1995	D. Haw.	93-255

ID	Case Name	Cite	Circuit	Year	District	Docket No.
594	*In re* GlenFed, Inc. Sec. Litig.	42 F.3d 1541	9th Cir.	1994	C.D. Cal.	91-344
603	Fobbs v. Holy Cross Health Sys. Corp.	29 F.3d 1439	9th Cir.	1994	E.D. Cal.	89-682
615	Plumes v. Quinlan	980 F.2d 738 (1992 WL 355504)	9th Cir.	1992	C.D. Cal.	91-392
617	Chandler v. McMinnville School Dist.	978 F.2d 524	9th Cir.	1992	D. Or.	90-147
624	Gila River Indian Cmty. v. Waddell	967 F.2d 1404	9th Cir.	1992	D. Ariz.	90-841
628	Gonzalez v. Mesa Verde Country Club	951 F.2d 360 (1991 WL 266541)	9th Cir.	1991	C.D. Cal.	89-6369
633	Pruitt v. Cheney	963 F.2d 1160	9th Cir.	1991	C.D. Cal.	83-2035
635	Datagate, Inc. v. Hewlett-Packard Co.	941 F.2d 864	9th Cir.	1991	N.D. Cal.	86-20018
657	Corbin v. Runyon	188 F.3d 518 (1999 WL 590749)	10th Cir.	1999	W.D. Okla.	96-1766
678	Smith v. E.N.M. Med. Ctr.	72 F.3d 138 (1995 WL 749712)	10th Cir.	1995	D.N.M.	92-641
680	Ramirez v. Okla. Dep't of Mental Health	41 F.3d 584	10th Cir.	1994	N.D. Okla.	91-681
702	Olson v. Hart	965 F.2d 940	10th Cir.	1992	D. Kan.	90-156
721	*In re* Edmonds	924 F.2d 176	10th Cir.	1991	D. Kan.	87-4196
731	Lopez v. First Union Nat'l Bank	129 F.3d 1186	11th Cir.	1997	S.D. Fla.	95-2650
749	Sofarelli v. Pinellas Cnty.	931 F.2d 718	11th Cir.	1991	M.D. Fla.	89-1311
752	Brown v. City of Fort Lauderdale	923 F.2d 1474	11th Cir.	1991	S.D. Fla.	87-6936
754	Executive 100, Inc. v. Martin Cnty.	922 F.2d 1536	11th Cir.	1991	S.D. Fla.	88-14188
778	Maydak v. United States	1999 WL 1006593	D.C. Cir.	1999	D.D.C.	97-2199
781	Caribbean Broad. Sys., Ltd. v. Cable & Wireless P.L.C.	148 F.3d 1080	D.C. Cir.	1998	D.D.C.	93-2050
782	Chandler v. D.C. Dep't of Corr.	145 F.3d 1355	D.C. Cir.	1998	D.D.C.	95-1735
791	Maljack Prod., Inc. v. Motion Picture Ass'n of Am.	52 F.3d 373	D.C. Cir.	1995	D.D.C.	90-1121
795	Bonham v. D.C. Library Admin.	989 F.2d 1242	D.C. Cir.	1993	D.D.C.	90-992
799	Okusami v. Psychiatric Inst. of Wash.	959 F.2d 1062	D.C. Cir.	1992	D.D.C.	90-800
809	Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft	19 F.3d 745	1st Cir.	1994	D.P.R.	91-1156
813	IUE AFL-CIO Pension Fund v. Herrmann	9 F.3d 1049	2d Cir.	1993	D. Conn.	94-2134

ID	Case Name	Cite	Circuit	Year	District	Docket No.
814	LaBounty v. Adler	933 F.2d 121	2d Cir.	1991	S.D.N.Y.	89-4242
820	Hayes v. Poe Homes Housing Project Mgmt.	931 F.2d 886 (1991 WL 68813)	4th Cir.	1991	D. Md.	90-1237
827	Walker v. Nat'l Recovery, Inc.	200 F.3d 500	7th Cir.	1999	N.D. Ill.	98-4530
832	Bozickovich v. Harper	165 F.3d 31 (1998 WL 767136)	7th Cir.	1998	N.D. Ill.	97-5138
833	Bennett v. Schmidt	153 F.3d 516	7th Cir.	1998	N.D. Ill.	96-6914
834	Moriarty v. Larry G. Lewis Funeral Dir. Ltd.	150 F.3d 773	7th Cir.	1998	N.D. Ill.	96-6973

Appendix Table 2. Cohort, by Circuit, Case Type, Success, Outcome, Pro Se Status, Administrative Office Code, and Year Terminated

ID	Circuit	Type	Success	Outcome	Pro Se	AOCode	Yr Termed
3	6th	Prison	No	SJforDef	Yes	550	1995
20	9th	Emp Discrim	Yes	Settled	No	442	1998
22	10th	Prison	Yes	PlffVerdict	No	550	1995
24	11th	Other	Yes	Settled	No	422	1996
27	D.C.	Nonprison civ rights	Yes	Settled	No	360	1999
31	S. Ct.	Nonprison civ rights	No	SJforDef	No	440	1993
46	1st	Emp Discrim	No	DefVerdict	Yes	190	1997
68	2d	Emp Discrim	Yes	Settled	No	442	2000
76	2d	Antitrust	Yes	Settled	No	410	2000
77	2d	Nonprison civ rights	No	Other	No	440	2005
78	2d	Emp Discrim	Yes	Settled	No	710	2000
79	2d	Prison	Yes	StipDism	Yes	550	2000
85	2d	Consumer	Yes	PlffVerdict	No	360	2001
87	2d	Antitrust	Yes	StipDism	No	410	2000
99	2d	Nonprison civ rights	Yes	StipDism	No	440	1998
101	2d	Emp Discrim	Yes	StipDism	No	442	1997
102	2d	Nonprison civ rights	No	SJforDef	No	440	1998
106	2d	Emp Discrim	Yes	StipDism	No	440	1996
107	2d	Prison	No	Dismissal	Yes	550	1996
108	2d	Nonprison civ rights	No	Dismissal	Yes	440	1999
109	2d	Nonprison civ rights	Yes	StipDism	No	440	1998
110	2d	Nonprison civ rights	No	DefVerdict	Yes	440	1995
114	2d	Tort	No	DefVerdict	No	370	1996
116	2d	Nonprison civ rights	Yes	StipDism	No	440	1995
118	2d	Prison	No	SJforDef	Yes	440	2002
122	2d	Nonprison civ rights	No	SJforDef	Yes	440	2002
123	2d	Sec Fraud	Yes	Settled	No	850	1994
128	2d	Sec Fraud	Yes	Settled	No	850	1993
130	2d	Nonprison civ rights	Yes	Settled	No	440	1995
133	2d	Sec Fraud	Yes	StipDism	No	370	1992
134	2d	Nonprison civ rights	No	Dismissal	Yes	890	1994

ID	Circuit	Type	Success	Outcome	Pro Se	AOCode	Yr Termed
135	2d	Prison	No	SJforDef	Yes	550	1996
139	2d	contract	No	Other	No	791	2001
140	2d	Nonprison civ rights	No	DefVerdict	No	440	1999
148	2d	Nonprison civ rights	No	Dismissal	Yes	440	1992
157	3d	Emp Discrim	Yes	Settled	No	440	2000
159	3d	Other	Yes	Settled	No	120	1998
161	3d	Emp Discrim	Yes	Settled	No	440	2000
180	4th	contract	Yes	Settled	No	190	1998
181	4th	Prison	No	SJforDef	No	550	1998
182	4th	Tort	Yes	Settled	No	360	1997
191	4th	Nonprison civ rights	No	SJforDef	No	440	1995
192	4th	Nonprison civ rights	Yes	StipDism	No	440	1994
194	4th	RICO	Yes	Settled	No	470	1995
196	4th	Nonprison civ rights	No	DefVerdict	No	440	1994
197	4th	contract	Yes	StipDism	No	190	1995
200	4th	contract	Yes	Settled	No	190	1993
204	4th	Other	Yes	StipDism	No	890	1992
214	5th	Other	Yes	Settled	No	340	2002
217	5th	Emp Discrim	Yes	StipDism	No	440	1999
221	5th	Nonprison civ rights	No	DefVerdict	No	442	2003
242	5th	RICO	Yes	Settled	No	470	1998
260	5th	Tort	Yes	StipDism	No	470	1997
265	5th	RICO	No	Dismissal	No	890	1995
273	5th	contract	Yes	Settled	No	140	1993
276	5th	Prison	No	DefVerdict	Yes	550	1991
288	6th	Nonprison civ rights	Yes	Settled	No	440	2005
290	6th	Nonprison civ rights	Yes	Settled	No	443	2002
299	6th	Tort	No	DefVerdict	No	360	1998
307	6th	Emp Discrim	No	SJforDef	No	790	1997
318	6th	Tort	No	SJforDef	Yes	360	1995
326	6th	Prison	No	SJforDef	Yes	550	1996
339	6th	Sec Fraud	Yes	Other	No	850	1993
355	6th	ERISA	Yes	Settled	No	890	1992
363	6th	Prison	No	SJforDef	Yes	550	1991
368	7th	Emp Discrim	Yes	Settled	No	442	2000
369	7th	Consumer	No	Dismissal	No	890	2000
373	7th	Emp Discrim	Yes	Settled	No	442	2001

ID	Circuit	Type	Success	Outcome	Pro Se	AOCode	Yr Termed
375	7th	Nonprison civ rights	No	DefVerdict	No	440	2000
380	7th	Tort	No	Dismissal	Yes	550	1999
381	7th	Consumer	Yes	Other	No	371	1999
385	7th	Prison	No	SJforDef	Yes	550	1999
392	7th	Tort	Yes	Settled	No	320	1998
396	7th	Emp Discrim	Yes	Settled	No	442	1998
404	7th	Sec Fraud	Yes	Settled	No	190	1997
407	7th	Prison	Yes	Settled	Yes	550	1998
408	7th	Nonprison civ rights	Yes	Settled	No	440	1998
413	7th	Prison	No	Dismissal	Yes	550	1998
421	7th	RICO	No	Dismissal	No	470	1997
429	7th	Prison	No	SJforDef	Yes	550	1996
432	7th	Prison	No	SJforDef	No	550	1996
433	7th	Antitrust	Yes	Settled	No	470	1997
454	7th	Nonprison civ rights	Yes	offer of judgment	No	440	1997
462	7th	Consumer	No	SJforDef	No	890	1996
469	7th	Emp Discrim	No	SJforDef	No	895	1994
471	7th	Emp Discrim	No	SJforDef	No	442	1995
474	7th	contract	Yes	PlffVerdict	No	190	1996
475	7th	Prison	No	SJforDef	No	550	1996
484	7th	Other	No	SJforDef	No	820	1994
486	7th	Other	No	Dismissal	No	890	1994
499	7th	Emp Discrim	No	SJforDef	No	442	1994
500	7th	Prison	No	SJforDef	Yes	550	1992
525	8th	Antitrust	No	SJforDef	No	410	2000
538	8th	Prison	Yes	Settled	No	550	1997
539	8th	Prison	No	SJforDef	No	440	1997
546	8th	Emp Discrim	No	SJforDef	Yes	442	1994
560	8th	Nonprison civ rights	No	Dismissal	Yes	440	1993
564	9th	Antitrust	Yes	Settled	No	410	2001
565	9th	Tort	Yes	StipDism	No	245	2000
570	9th	Tort	Yes	StipDism	No	791	1998
571	9th	Other	Yes	Settled	No	110	2002
574	9th	Nonprison civ rights	Yes	Settled	No	443	1997
577	9th	Nonprison civ rights	Yes	Settled	Yes	440	1997
582	9th	Other	Yes	Settled	No	360	1997
583	9th	Tort	No	DefVerdict	No	360	1997
588	9th	Tort	No	SJforDef	No	362	1996
594	9th	Sec Fraud	Yes	Settled	No	850	2001
603	9th	Emp Discrim	Yes	StipDism	No	440	1995

ID	Circuit	Type	Success	Outcome	Pro Se	AOCode	Yr Termed
615	9th	Prison	No	SJforDef	Yes	550	1994
617	9th	Nonprison civ rights	Yes	StipDism	No	440	1993
624	9th	Other	No	SJforDef	No	950	1994
628	9th	ERISA	Yes	Settled	No	791	1992
633	9th	Nonprison civ rights	Yes	Settled	No	440	1995
635	9th	Antitrust	Yes	Settled	No	410	1996
657	10th	Emp Discrim	Yes	Settled	No	442	2000
678	10th	Nonprison civ rights	Yes	Settled	No	190	2001
680	10th	Nonprison civ rights	Yes	Settled	No	442	1995
702	10th	Nonprison civ rights	No	DefVerdict	Yes	950	1992
721	10th	Other	Yes	Settled	No	422	
731	11th	Other	No	SJforDef	No	430	1998
749	11th	Nonprison civ rights	Yes	Settled	No	443	1992
752	11th	Emp Discrim	No	SJforDef	Yes	442	1999
754	11th	Nonprison civ rights	No	SJforDef	No	440	1993
778	D.C.	Prison	No	SJforDef	Yes	895	2007
781	D.C.	Antitrust	Yes	StipDism	No	410	1999
782	D.C.	Prison	Yes	StipDism	No	550	2000
791	D.C.	contract	Yes	StipDism	No	840	2001
795	D.C.	Nonprison civ rights	No	SJforDef	Yes	440	1995
799	D.C.	Tort	No	SJforDef	No	890	1995
809	1st	Antitrust	Yes	Settled	No	410	1994
813	2d	ERISA	Yes	Settled	No	791	1996
814	2d	Prison	No	SJforDef	Yes	550	2000
820	4th	Nonprison civ rights	No	Dismissal	Yes	443	2002
827	7th	Consumer	Yes	Settled	No	890	2000
832	7th	Tort	Yes	StipDism	No	360	1999
833	7th	Emp Discrim	Yes	Settled	No	440	2000
834	7th	Other	No	SJforDef	No	720	2001

Appendix Table 3. All Dispositions, Absolute Numbers

Disposition (all Cases)	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	Total
Dismissal, Failure to Prosecute	3681	7511	8634	7517	6864	7522	8124	8453	8314	8530	6074	81224
Dismissal, Lack of Jurisdiction	5088	5494	4965	3631	3611	3401	3523	3769	3966	3772	3028	44248
Judgment, Motion Before Trial, Defendant	11862	24687	25858	26832	29039	32313	32560	31071	30510	29303	22007	296042
Judgment, Motion Before Trial, Other	512	789	796	802	673	625	681	766	681	582	515	7422
Jury Verdict, Defendant	824	1625	1812	1967	2092	2133	2160	2268	2147	2002	1378	20408
Jury Verdict, Other	59	113	135	127	145	151	144	154	128	112	75	1343
Directed Verdict, Defendant	148	277	239	260	222	225	231	205	197	158	97	2259

Disposition (all Cases)	**1990**	**1991**	**1992**	**1993**	**1994**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**	**Total**
Directed Verdict, Other	2	14	8	11	4	5	19	8	3	5	1	80
Court Verdict, Defendant	854	1703	1747	1690	1599	1661	1431	1237	961	833	605	14321
Court Verdict, Other	87	165	149	125	122	133	106	99	90	77	60	1213
Judgment on other grounds, Defendant	1689	4210	5544	5995	6378	6486	6431	4808	5694	5370	3848	56453
Judgment on other grounds, Other	742	1373	1194	765	1640	2707	3620	4037	4062	4192	3460	27792
Default Judgment	7150	16016	19319	11929	9147	8189	9614	12034	15145	17731	16085	142359
Consent Judgment	3517	6763	8194	6175	4611	4097	4336	4452	4649	5291	4121	56206
Judgment, Motion Before Trial, Plaintiff	3424	6839	6704	6268	5126	4897	4782	4746	4804	4519	3586	55695
Jury Verdict, Plaintiff	730	1654	1609	1405	1460	1386	1461	1486	1434	1290	891	14806

Disposition (all Cases)	**1990**	**1991**	**1992**	**1993**	**1994**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**	**Total**
Directed Verdict, Plaintiff	114	210	50	53	52	40	36	32	29	26	22	664
Court Verdict, Plaintiff	648	1220	1230	1077	1029	869	806	759	756	706	540	9640
Judgment on Other Grounds, Plaintiff	669	1813	2639	2500	2021	1867	1914	1819	1674	1618	1184	19718
Settlement	25530	50976	54294	57191	53753	51598	53130	54383	56301	58683	44461	560300
Voluntary Dismissal	9281	21123	24303	23654	23207	23203	23688	25910	25537	8826	20514	229246
Other Dismissal	15553	38916	37388	40559	42853	47189	53805	51574	62642	52947	36517	479943
Total	**92164**	**193491**	**206811**	**200533**	**195648**	**200697**	**212602**	**214070**	**229724**	**206573**	**169069**	**2121382**

Appendix Table 4. Distribution of Terminated Cases by AO Code, 1990–2000

AO Code	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	Total
190 (contract)	9124 (9.9%)	17442 (9.0%)	13965 (6.8%)	16921 (8.4%)	15197 (7.8%)	15084 (7.5%)	14852 (7.0%)	15571 (7.3%)	14990 (6.5%)	14343 (6.9%)	14532 (8.6%)	162021 (7.6%)
360 (PI)	3248 (3.5%)	6431 (3.3%)	5388 (2.6%)	7155 (3.6%)	7255 (3.7%)	7295 (3.6%)	7599 (3.6%)	7710 (3.6%)	8581 (3.7%)	6814 (3.3%)	6372 (3.8%)	73848 (3.5%)
410 (Antitrust)	218 (0.2%)	480 (0.25%)	436 (0.2%)	6619 (3.3%)	525 (0.3%)	435 (0.2%)	482 (0.2%)	516 (0.2%)	466 (0.2%)	424 (0.2%)	417 (0.2%)	11018 (5.2%)
440 (Civ Rights)	4659 (5.1%)	9507 (4.9%)	8205 (4.0%)	12166 (6.1%)	13393 (6.9%)	14188 (7.1%)	15450 (7.3%)	16426 (7.7%)	16535 (7.2%)	16275 (7.9%)	17020 (10.1%)	143824 (6.8%)
442 (Emp Disc)	4026 (4.4%)	7974 (4.1%)	6895 (3.3%)	10296 (5.1%)	12226 (6.3%)	14955 (7.5%)	18444 (8.7%)	20552 (9.6%)	22556 (9.8%)	22694 (11.0%)	21514 (12.7%)	162132 (7.6%)
443 (Accom)	142 (0.15%)	369 (0.2%)	362 (0.2%)	508 (0.25%)	579 (0.3%)	640 (0.3%)	726 (0.3%)	844 (0.4%)	830 (0.4%)	863 (0.4%)	1204 (0.7%)	7067 (0.3%)
470 (RICO)	457 (0.5%)	887 (0.46%)	721 (0.35%)	821 (0.4%)	699 (0.35%)	669 (0.3%)	815 (0.4%)	689 (0.3%)	722 (0.3%)	767 (0.4%)	701 (0.4%)	7948 (3.7%)
550 (Prison)	11765 (12.8%)	24173 (12.5%)	20717 (10.0%)	30225 (15.1%)	33949 (17.4%)	38879 (19.4%)	40200 (18.9%)	29525 (13.8%)	18417 (8.0%)	14445 (7.0%)	13011 (7.7%)	275306 (13.0%)
All Cases, All Codes	**92164**	**193491**	**206811**	**200533**	**195648**	**200697**	**212602**	**214070**	**229724**	**206573**	**169069**	**2121382**

Appendix Table 5. Cohort by Discovery Post-Remand and Success

Outcome	Successful (%)	Unsuccessful (%)	Total (%)
Discovery on remand	41 (47.1%)	46 (52.9%)	87 (73.7%)
No discovery on remand	21 (67.7%)	10 (32.3%)	31 (26.3%)
Total	**62 (52.5%)**	**56 (47.5%)**	**118**

Appendix Table 6. Cohort Outcomes by Year of Resolution

Year Filed	Successful	Unsuccessful	Total
1991	0	2	2
1992	5	3	8
1993	5	3	8
1994	3	9	12
1995	7	8	15
1996	6	9	15
1997	10	5	15
1998	11	5	16
1999	5	5	10
2000	13	3	16
2001	6	3	9
2002	3	3	6
2003	0	1	1
2004	0	0	0
2005	1	1	2
2006	0	0	0
2007	0	1	1
NA	1	0	1
Total	**76**	**61**	**137**